Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BERMAN ENTERPRISES INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Petitioners,

—VS.—

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, McALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPOPTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does a multiemployer collective bargaining association and union engage in an anticompetitive combination in violation of Sherman Act §1, 15 U.S.C. §1, that exceeds the scope of labor's nonstatutory exemption from the antitrust laws by (i) agreeing to force a non-union competitor, not a member of the association, to become a party to and abide by the association-union labor contract as an affiliate of a member of the association, and (ii) agreeing not to provide certain services to the non-union competitor unless it abides by working conditions in the association-union labor contract, for the stated purpose of preventing the non-union competitor from undercutting the prices charged by association members?

2. Does an agreement by a multiemployer association of competitors and a union which requires a non-union affiliate of an association member to recognize the union and become party to the multiemployer labor contract against its will exceed the scope of labor's nonstatutory exemption from the antitrust laws because questions of union representation must be submitted to the National Labor Relations Board for resolution under Section 9 of the National Labor Relations Act, 29 U.S.C. §159, and cannot lawfully be resolved through multiemployer bargaining without violating Section 8 of the National Labor Relations Act, 29 U.S.C. §158?

3. Is the distinction between primary and secondary labor activity that is applicable to violations of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(B), also applicable to violations of Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(A), that involve union threats to strike with the object of forcing an employer to join a multiemployer organization?

4. Does union pressure to restrain members of a multi-employer collective bargaining association from providing services to a non-union company with the object of forcing the non-union company to abide by working conditions in the association-union labor contract, constitute secondary labor activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(B), without regard to whether or not the union's purpose is work preservation and maintaining union standards?

5. When the injury alleged is loss of business from an agreement to refuse to deal in violation of antitrust and labor law, may defendants argue to a jury that increasing salaries received by the management of plaintiff, a closely held business, prove that plaintiff was not injured in its business or property within the meaning of Clayton Act §4, 15 U.S.C. §15, and Section 303 of the Labor Management Relations Act, 29 U.S.C. §187?

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In the

Supreme Court of the United States

October Term, 1981

Berman Enterprises Inc., Standard Tank Cleaning Corp., and General Marine Transport Corp.,

Petitioners,

—vs.—

Local 333, United Marine Division, International Longshoremen's Association, Marine Towing and Transportation Employers' Association, McAllister Brothers, Inc., Diesel Vessel Operators, Inc., Spentonbush Transport Service, Inc., Morania Oil Tanker Corporation, Bouchard Transportation Company, Inc., Moran Towing & Transportation Company, Inc., Poling Transportation Corporation, Eklof Marine Corporation, Red Star Marine Services, Inc., Reinauer Transportation Companies, Inc., and Turecamo Coastal & Harbor Towing Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Berman Enterprises Inc., General Marine Transport Corp. and Standard Tank Cleaning Corp. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered February 25, 1981, and an order denying a petition for rehearing of said judgment, containing a suggestion for

rehearing en banc, entered May 13, 1981, that affirmed a judgment entered October 26, 1979, and an order denying a new trial, judgment n.o.v. and injunctive relief entered March 4, 1980, by the United States District Court of the Southern District of New York in favor of respondents.

Citation to Opinion Below

The opinion of the Court of Appeals is reported at 644 F.2d 930 and is set out in the Appendix. The order of the Court of Appeals denying the petition for rehearing is unreported and is set out in the Appendix. The bench opinion of the District Court dismissing certain claims, and the opinion of the District Court denying petitioner's post-trial motions, are unreported and are set out in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1981. Following this judgment, petitioner filed a timely petition for rehearing containing a suggestion for rehearing en banc. On May 13, 1981, the Court of Appeals denied the petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

This case involves the following federal statutes:

a. *15 U.S.C. §1*

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or the foreign nations, is declared to be illegal....

b. *15 U.S.C. §15*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

c. *15 U.S.C. §26*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

d. *29 U.S.C. §158(b)(4)*

(b) It shall be an unfair labor practice for a labor organization or its agents—

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(4)(i) to engage in, or to induce or encourage any individual employed by a person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

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e. *29 U.S.C. §159*

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

f. 29 U.S.C. §187

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case[1]

1. *Nature of the Case*

This petition concerns the legality of labor practices and collective bargaining provisions in the marine transportation service industry under Sherman Act § 1, 15 U.S.C. § 1, and Section 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 8(b)(4). The jurisdiction of the district court was invoked under Clayton Act §§ 4 and 16, 29 U.S.C. §§ 15, 26, and Section 303(b) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187(b).

Petitioners, the plaintiffs below, are three affiliated companies, Berman Enterprises Inc. ("Berman"), General Marine Transport Corp. ("General Marine"), and Standard Tank Cleaning Corp. ("Standard Tank"). They allege antitrust violations by Marine Towing and Transportation

[1] The statement of the case generally follows the opinion of the court of appeals set out in the Appendix.

Employers' Association ("Association"), a multiemployer bargaining organization, certain of the Association's members, and Local 333, United Marine Division, International Longshoremen's Association ("Union"), a union representing vessel employees. Petitioners also allege labor law violations by the Union.

At trial, the district court, after petitioner rested, dismissed all elements of the antitrust claim except that portion alleging a conspiracy to refuse to deal with Berman. The jury subsequently returned verdicts against Berman and the companies affiliated with it on the remaining antitrust claim and on the labor claim. The court then denied petitioners' request for injunctive relief. On appeal the three affiliated companies argued that the antitrust claims should not have been dismissed, that the court should have directed a verdict for the appellants on the labor claim, and that evidence concerning salaries of Berman officers should not have been the subject of argument to the jury that Berman was not injured by the conspiracy alleged. The court of appeals rejected these contentions and affirmed.

2. *Facts*

Berman, General Marine, and Standard Tank are all owned by Standard Marine Services, Inc., which in turn is owned by Evelyn Berman Frank and her brothers. Berman operates tugs, barges, and harbor tankers in New York harbor; General Marine operates two ships which dispose of sewage sludge produced by municipal customers; and Standard Tank operates a vessel-cleaning facility and one tank-cleaning vessel.

General Marine was a member of the Association at the time the dispute in question arose, but Berman and Standard Tank were not and the Union did not represent their

employees. The Union and the Association have three labor contracts covering employees on tugs, barges and self-propelled tankers, respectively. Berman, or its predecessor, and the Association member corporations have for many years been customers as well as competitiors of one another, hiring each other's tugs or barges from time to time, but also competing for business from third parties. Berman operates with one man on a barge and four-man tug crews, whereas members of the Association, pursuant to a collective bargaining agreement with the Union, operate with two men on a barge and a six- or seven-man tug crew.

Well before April 1, 1976, the date of the new collective bargaining agreement with which we are concerned here, the Union unsuccessfully sought to require Berman to cease towing unmanned vegetable oil barges of MOTC Acquisitions Corp. (MOTC).[2] The Union had decided that all barges with less than a certain carrying capacity should be manned by a crew of two. A federal district court, however, enjoined the Union from so coercing Berman, and the National Labor Relations Board ("NLRB") subsequently found that the Union had engaged in a secondary boycott unlawful under Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), as well as having violated other provisions of the NLRA, *United Marine Division Local 333*, 226 N.L.R.B. 1214 (1976). Shortly thereafter the Union, claiming that it had previously terminated its labor contract, struck General Marine but again was unsuccessful; a federal district court enjoined the strike and the court of appeals upheld the injunction on appeal, *General Marine Transport Corp.* v. *Local 333, United Marine Division*, No. 75-7559 (2d Cir. Mar. 10, 1976). General Marine

[2] "Vegetable oil barges" included any barge under 55,000 barrels used in the animal, vegetable or fish oil trades.

later obtained favorable holdings on this matter both before the NLRB, which found violations of Sections 8(d), 8(b)(3) and 8(b)(1)(A) of the NLRA, *United Marine Division Local 333,* 228 N.L.R.B. 1107 (1977), and before an arbitrator.

In January 1976 the Union made certain demands upon the Association for contract provisions to be incorporated in the new collective bargaining agreement which was to commence on April 1, 1976. The demands were designed to achieve its goals for industry-wide barge manning standards and to prevent further resistance to such standards by Berman. This was followed by a Union demand made to General Marine that all the Berman companies' crew members, except those on the tank-cleaning vessel, join the Union and that all hiring be done through the Union hiring hall. Further negotiations, accompanied by the litigation noted above, resulted in an impasse, with the Union threatening to strike the Association unless it complied with the demands. General Marine refused to resign from the Association despite the Association bargaining committee's statement that unless it did so the Association would enter into a contract that satisfied the Union.

Finally on March 26, 1976, the Union and the Association entered into a Memorandum of Agreement containing what we will call the "vegetable oil" and "affiliates" clauses. The first clause in effect required two men to be aboard all vegetable oil barges carrying less than 55,000 barrels, a clause applicable to the Berman petroleum barges because they could be cleaned to carry vegetable oil.[3] The second

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[3] The "vegetable oil" clause read:

> 9. Section 29. Vegetable Oil Barges. No vessel operated under this contract shall tow any barge under 55,000 barrels used in the animal, vegetable, or fish oil trades unless there are two men aboard the barge at all times.

clause required affiliates[4] of Association members to operate under the contract and provided for strikes against noncomplying employers. In a column in a Union newspaper, the Union president explained that the clauses had been added to the Union-Association contract to prevent companies that were not members of the Association from undercutting the prices of companies abiding by the Association-Union contract and taking work away from Association members.[5]

After the Union ratified the new contract, the Union president wrote General Marine to demand compliance with the affiliates clause and listed fourteen Berman-General Marine vessels which he claimed were covered by the Union-Association contract. At about the same time, in early April 1976, the Union membership was informed about and advised to enforce the vegetable oil clause, on pain of discipline. Following General Marine's response that the contract exceeded the scope of the Association's bargaining power and constituted a group boycott, the Union again struck General Marine. The Union also advised Association members not to deal with Berman and specifically not to tow Berman barges with less than two men aboard. Some Association members issued orders to

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[4] The affiliates clause read in part:

> 8. Section 1. Application of Agreement. This Agreement applies only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity.

[5] The Union president's newspaper column stated:

> For several years, we have been having problems with certain companies who have been trying every way possible to duck our contracts and the wages, benefits and working conditions our membership is entitled to under those contracts. The actions of these companies, and some of the men employed by them, have a ripple effect throughout the industry. The

their employees not to deal with Berman and Berman's business fell with respect to them.[6]

Subsequently, in June 1976, Berman filed a petition with the NLRB for an election to determine whether its employees wanted to be represented by a labor union. The Union opposed such an election, but the NLRB's Regional Director ordered an election and the Berman employees chose as their union, and the NLRB certified, a rival union, Marine Engineers Beneficial Association (MEBA).

3. *Proceedings Below*

This suit by Berman, General Marine and Standard Tank is in two counts. The first count charges all defendants with a combination in restraint of trade under Sherman Act § 1, 15 U.S.C. § 1, and seeks damages under Clayton Act § 4, 15 U.S.C. § 15, and an injunction under Clayton Act § 16, 15 U.S.C. § 26. The second count charges the Union alone with violation of Section 303 of the LMRA, 29 U.S.C. § 187, and seeks damages from the Union.

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companies have been able to undercut the rates of companies abiding by the contract, and thus expand and take work away from others resulting in a loss of jobs for our members. The new clauses and clause revisions are designed to strengthen the contract against this type of action, making the companies competitively equal and thus providing greater job security for our membership. I have said in the past that knowing your contract is very important. It now becomes even more important that every member know and abide by this contract.

[6] The court of appeals explanation that the drop in the volume of Berman's business could be explained by other factors (App. 13) is irrelevant to this petition because judicial review of dismissal of claims for failure to state a cause of action requires all factual inferences be made in petitioners' favor. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). The district court itself found the evidence supported a conclusion that the drop in the volume of Berman's business was caused by the respondent corporations' refusal to deal. (App. 21-22)

The district court held that the vegetable oil and affiliates clauses, as well as the actions taken under them, did not constitute antitrust violations because of labor's nonstatutory exemption to the antitrust laws, and, alternatively, that the clauses did not have the anticompetitive purpose or effect necessary to violate Sherman Act § 1. (App. 21-22) The district court dismissed Berman's antitrust claims based upon the clauses after petitioners rested and subsequently instructed the jury that the clauses were not illegal and could be used only as evidence of a separate agreement to refuse to deal, an agreement which the jury specially found did not exist. The jury also specially found against Berman and its affiliated companies on three questions submitted under the labor law count.[7] The district court further allowed defendants to argue to the jury that the increasing salaries paid to executives of Berman showed that Berman had not been injured even if there had been an agreement to refuse to deal. Following the verdict, the trial judge denied motions for a new trial, for judgment notwithstanding the verdict against the Union on the labor law count, and for injunctive relief.

The court of appeals affirmed. The court held that the vegetable oil clause—the agreement not to tow barges unless manned by two persons—was legitimate labor activity and did not violate Sherman Action § 1 because it "was designed to prevent erosion of manning standards by outside

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[7] The three questions, all answered negatively by the jury, were:

4. Did Local 333 induce or encourage its members to refuse to work for their employers when asked to work on Berman vessels or threaten, coerce or restrain the Association or the corporate defendants in order to:

(a) Force Berman to become a member of the Association?

(b) Force Berman to recognize Local 333 as the representative of its employees?

(c) Force the Association or the corporate defendants to cease doing business with Berman?

economic pressure, to protect jobs and to promote safety at sea." (App. 10) The court also held that Union pressure to prevent the barges from being towed did not violate Section 8(b)(4)(B) of the NLRA because "the sometimes competitive relationship between Berman barges and Association barges" meant that "Berman's undermanned barges may have taken jobs away from the bargaining unit". (App. 16)

The court of appeals found that the affiliates clause—the agreement to force non-union Berman to abide by the Association-Union contract by virtue of its affiliation with General Marine—was "more troublesome". Berman was not a member of the Association and the Union did not represent its employees. Nonetheless, the court held that although the agreement "may appear broader than necessary to fulfill legitimate union objectives", it was immune from antitrust attack under the nonstatutory exemption because Berman and General Marine constituted a single employer as a result of employee interchange and "it was a legitimate union objective to protect employees against shifts of work days (and vessels) designed to avoid the standards and wages established in the collective bargaining agreement". (App. 11-12) The court concluded that existing Supreme Court decisions are "not applicable here because they involved employer bargaining groups and unions conspiring to injure truly separate concerns". (App. 12)

The court of appeals also held that the affiliates clause did not have "either an anticompetitive purpose or an anticompetitive effect" despite the Union president's admission that the purpose was to prevent non-members of the Association who did not operate in accordance with the Association-Union labor contract from undercutting the prices of Association members and taking work away from them.

The court held that the "true purposes" were "job preservation, maintenance of working conditions and safety, none of which is anticompetitive in nature." (App. 12-13) With respect to the claim that the affiliates clause and efforts to enforce it violated Section 8(b)(4)(A) of the NLRA because it required an employer, Berman, to become a member of an employer's organization, the Association, the court held that the distinction between primary and secondary labor activity in Section 8(b)(4)(B) was applicable to a violation of Section 8(b)(4)(A) and there was evidence to support the view that the Union's conduct was primary. (App. 13-14) Finally, the court of appeals held that the argument about salaries and antitrust injury was one that a jury properly could consider.

Reasons for Granting the Writ

Association of competitors into multiemployer bargaining organizations that negotiate labor contracts with unions has become pervasive in American industry. Such organizations offer the opportunity for anticompetitive and other abuses that this Court cautioned against in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965) (". . . because they must bargain does not mean that the agreement reached may disregard other laws"). This case, in which a multiemployer association of competitors and a union use self-help and economic coercion to impose labor standards industry-wide, raises questions of exceptional importance to competition and the appropriate limits of multiemployer bargaining. The writ should be granted to resolve these questions.

The judgment below authorizes a multiemployer association and union to impose a labor contract on a non-union company that the association does not represent and whose

employees the union does not represent. The rationale for the result is that the imposition of uniform working conditions eliminates labor cost competition from the non-unit company and preserves the work available for association members. The holding that the conduct does not violate Sherman Act §1, and is within labor's nonstatutory exemption from the antitrust laws, conflicts with prior decisions of this court including *United Mine Workers* v. *Pennington, supra, Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975), and *Federal Maritime Commission* v. *Pacific Maritime Association,* 435 U.S. 40 (1978). The holding would further permit a multiempoyer association and union to determine unit questions and decide the bargaining representative of the non-union employees thereby circumventing NLRB certification procedures. This conflicts with the Court's judgment in *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*).

Other courts of appeal and the NLRB hold that participation in multiemployer contracts is voluntary. The decision below conflicts with decisions that union threats to strike with the object of forcing an employer to become a party to a multiemployer labor contract violates Section 8(b)(4)(A) of the NLRA because an employer has an absolute right to refuse to become so bound. *See Frito Lay* v. *Teamsters Local Union 137,* 623 F.2d 1354 (9th Cir. 1980); *Union De Tronquistas De Puerto Rico* v. *Arlook,* 586 F.2d 872 (1st Cir. 1978). The decision holds instead that the distinction between primary and secondary labor activity in Section 8(b)(4)(B) of the NLRA applies to violation of Section 8(b)(4)(A). The effect of the holding is that an employer can be forced to participate in a multiemployer labor contract against its will, a grant of exceptional authority to multiemployer associations of competi-

tors and unions. The writ should be granted to decide whether the exercise of such authority can be lawful under Section 8(b)(4)(A) and to resolve the conflict between the circuits.

The decision also departs from this Court's judgment in *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971), on the application of Section 8(b)(4)(B) of the NLRA. The decision below holds that a union may pressure members of a multiemployer association neutral to a dispute to disrupt the business they do with a non-union company to force the non-union company to adopt union work rules (barge manning standards). The court of appeals holds that if a union's purpose is "work preservation" and the maintenance of "union standards", it may try to influence the labor practices of the target company by pressuring neutral employers. The writ should be granted because the holding permits a union to impose its work rules outside of the bargaining unit and thereby achieve industry-wide work rule goals without representing employees of the companies whose labor practices it wants to change.

Finally, the judgment below allows defendants to use financial information about management salaries unrelated to the question of injury under Clayton Act §4 and Section 303 of the LMRA in violation of the decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 447 (1977). Antitrust injury is a question of causation. Salaries received by management of the injured company are irrelevant to the statutory question of whether or not the unlawful conspiracy is the cause of the business disruption. Salaries, whether they increase or decrease, cannot help answer the injury question. The writ should be granted because antitrust and labor cases frequently involve financial evidence that cannot be fairly weighed unless the par-

ties are restricted to contesting the statutory elements of a violation and prohibited from making arguments to a jury that have no legal or economic basis.

I.

The Decision Departs From Precedent in Holding That Sherman Act §1 Was Not Violated by the Clauses Included in the Multiemployer Contract and Insulates Abuses of Multiemployer Bargaining Associations of Competitors From Judicial Scrutiny.

The decision below permits a multiemployer association of competitors and a union to pursue their self-interest at the expense of a non-member competitor. The "affiliates" clause is an anticompetitive agreement to impose a labor contract on non-unit employers condemned in *United Mine Workers* v. *Pennington, supra.* The "vegetable oil" clause is a group boycott—an agreement among competitors to deal with third parties only on certain terms and conditions—a *per se* violation of Sherman Act §1. The holding that the clauses are not anticompetitive despite the admission of the Union president that their purpose is to restrain price competition by establishing industry-wide labor costs makes the elimination of competition over labor costs legitimate labor activity even when the union does not represent the non-union target. However, agreements to impose labor terms and conditions industry-wide are against the policy of both antitrust and labor laws. *United Mine Workers* v. *Pennington,* 381 U.S. at 668. ("The anticompetitive potential of such a combination is obvious. . . ."); *Federal Maritime Commission* v. *Pacific Maritime Association,* 435 U.S. at 62-3 (Union-Association imposition of labor terms on non-unit employers is anticompetitive). Excusing such industry-wide restraints because they

ensure "maintenance of working conditions" (App. 13) and "prevent erosion of manning standards by outside economic pressure" (App. 10), simply uses euphemisms to state benefits that any cartel hopes to achieve from the elimination of outside competition. *Compare United States* v. *Socony-Vacuum Co.*, 310 U.S. 150 (1940).

The decision that the "vegetable oil" clause is exempt from Sherman Act §1 under the nonstatutory exemption authorizes an agreement to boycott unless Berman does what the Union wanted and manned its barges with two men instead of one, a *per se* violation of Sherman Act §1. *See e.g. St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531 (1978). The invocation of the nonstatutory exemption on the grounds that bargaining unit jobs would be preserved since "Berman's undermanned barges may have taken jobs away from the bargaining unit" (App. 16) makes the elimination of competition a virtue whenever the union and multiemployer allegedly perceive a threat to bargaining unit standards. However, the preservation of "standards" does not make it legitimate to engage in conduct which eliminates competition. *See National Society of Professional Engineers* v. *United States*, 435 U.S. 696 (1978).

The decision that the "affiliates" clause is exempt from Sherman Act §1 under the nonstatutory labor exemption on the grounds that Berman and General Marine are a single employer is a failure to apply to antitrust cases a long line of decisions under the NLRA about the appropriate scope of collective bargaining.[8] Even when there is a "single employer", union proposals to impose labor terms on unrepresented employees are *nonmandatory* subjects of

[8] The decision also departs from an earlier decision of a different panel of the same court which stated that Berman is distinct from General Marine. *See General Marine Transport Corp.* v. *NLRB*, 619 F.2d 180, 187-88 (2d Cir. 1980).

bargaining.[9] This is so even though the union's motive is to protect the standards and wages established in a collective bargaining agreement from the competition of the unrepresented group. *Sperry Rand Corp.* v. *NLRB*, 492 F.2d 63 (2d Cir. 1974), *cert. denied*, 419 U.S. 831 (1976); *NLRB* v. *Local 542, Operating Engineers*, 532 F.2d 902, 907 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); *Glendale Manufacturing Co.* v. *Local 520, ILGWU*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961); *General Warehousemen and Helpers* v. *Standard Brands*, 579 F.2d 1282, 1291 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 2420 (1979); *Local 7-210, Oil, Chemical and Atomic Workers* v. *Union Tank Car Co.*, 475 F.2d 194 (7th Cir. 1973), *cert. denied*, 414 U.S. 875 (1973). Nonmandatory subjects of bargaining are not entitled to an exemption from the antitrust laws. *Local Union 189* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

The decision below that the "affiliates" clause was legitimate labor activity because some General Marine employees also worked on Berman vessels allows a union and multiemployer association to absorb non-union employers and employees without resort to NLRB certification procedures. This conflicts with this Court's judgment in *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976) (*per curiam*), that the scope of the bargaining unit can only be determined by the NLRB under Section 9 of the NLRA, 29 U.S.C. §159. Many companies with subsidiaries or divisions are single employers, yet it has never been suggested that this requires a *single*

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[9] Courts hold that an "affiliates" clause is not a mandatory subject of bargaining even when the union represents the affiliate's employees. A union violates Section 8(b)(3) of the NLRA, 29 U.S.C. §158(b)(3), when it coerces an employer to agree to such a clause. *Lone Star Steel Co.* v. *NLRB*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S. Ct. 1349 (1981); *Amax Coal Co.* v. *NLRB*, 614 F.2d 872, 883-84 (3d Cir. 1980), *rev'd in part on other grounds*, —— U.S. ——, 49 U.S.L.W. 4869 (1981).

bargaining unit or that such a unit can be forced upon an employer. The decision in *South Prairie*, 518 F.2d 1040 (D.C. Cir. 1975), *rev'd*, 425 U.S. 800 (1976) (*per curiam*), is exactly on point because it was the "interchange" and "fungibility" of employees on which the District of Columbia circuit relied. This Court reversed. The decision's claim that Berman was not "truly" separate from General Marine thus permits an association of competitors and a union to impose an entire contract on Berman and its unrepresented employees allegedly to stop transfer of crew members and vessels between affiliates (App. 11-12) when a simple grievance filed under General Marine's contract with the Union would have sufficed without having an adverse impact on Berman.

The decision below licenses the forceful imposition of labor contracts on "single employers" even when their unrepresented employees do not wish to be represented by a union—a dangerous rule. Congress has designated the NLRB to be the exclusive agency to settle questions concerning the representation of employees. *Carey* v. *Westinghouse*, 375 U.S. 261 (1964). Petitioner submits that the correct analysis is to leave questions of representation to the NLRB and not to a multiemployer association of competitors, and to apply traditional antitrust principles. Too much is at stake in terms of industry competition and labor relations to do otherwise.[10] These issues recur[11] because of

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[10] For example, the New York Times reports that in the 1979 negotiations between the Association and Union, the Union insisted on expanding the scope of the "affiliates" clause so that it affected the Association generally. The Union wanted the 1976 "affiliates" clause expanded to include operations from Virginia to Maine and not just the Port of New York. A three-month strike costing the New York economy $1.5 billion resulted. N.Y. Times, June 12, 1979, §B at 4, col. 3; *id.*, June 13, 1979, §B at 4, col. 3; *id.*, June 14, 1979, §A at 1, col. 2.

[11] *See e.g. California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980).

the prevalence of multiemployer bargaining and the writ should be granted to resolve them.

II.

The Decision Below Conflicts With the Decision of Other Courts of Appeal Which Hold That Under Section 8(b)(4)(A) of the NLRA an Employer Has an Absolute Right to Refuse to Become Party to a Multiemployer Contract.

The words of Section 8(b)(4)(A) of the NLRA preclude the judgment below. The decision holds that the distinction between primary and secondary labor activity, which is found in the proviso in Section 8(b)(4)(B) of the NLRA, is also part of Section 8(b)(4)(A) which contains no such proviso. In *Frito-Lay* v. *Teamsters Local Union 137, supra,* the Ninth Circuit concluded after thorough analysis that an employer had an absolute right to refuse to become party to a multiemployer contract. The First Circuit's conclusion was the same in *Union De Tronquistas De Puerto Rico* v. *Arlook, supra.* The Ninth Circuit's analysis of the legislative history of Section 8(b)(4)(A) in *Frito-Lay* shows that "because of congressional concern over industry-wide employer bargaining in general—and its perceived evils, such as crippling industry-wide strikes, collusion, stifling of competition and 'shocking restraints of trade' ", Section 8(b)(4)(A) was enacted to guarantee that no business would be forced to become a party to a multiemployer contract against its will. 623 F.2d at 1358-59 (citation omitted). The "work preservation" motivation, which frequently determines the primary or secondary nature of conduct under Section 8(b)(4)(B), is irrelevant under Section 8(b)(4)(A).

The decision below conflicts with these other decisions. Berman was not a member of the Association and the Union

did not represent Berman's employees. (App. 3) Nonetheless, the decision holds that the Union could threaten the Association with a strike to force Berman to become party to the multiemployer contract against its will because ". . . section 8(b)(4)(A) . . . of the NLRA [is] intended to prohibit not agreements or actions directed toward the primary employer, but secondary objectives. . . ." (App. 13-14) The court is wrong because the statute is very clear: pressure on Berman, the primary employer, to force it to abide by the multiemployer contract violates Section 8(b)(4)(A). *A fortiori,* pressure applied to neutral employers, *i.e.,* Association members, for the same purpose, violates Section 8(b)(4)(A).

To grant multiemployer organizations and unions the power to force unwilling employers to join in their contracts raises questions of exceptional importance to industry-wide collective bargaining. In addition, because industry generally and the industry involved here, operates in the jurisdiction of several courts of appeal, the conflict between the circuits will result in differing treatment of the same parties depending on the forum. For example, the parties here operate in the jurisdiction of at least the First, Second, and Third circuits and there is presently the conflict between the First and Second circuits. The writ should be granted to resolve the question of statutory interpretation and to eliminate the conflict in the circuits.

III.

Union Pressure on Neutral Employers for the Purpose of Achieving Changes in the Work Practices of a Primary Employer Violates Section 8(b)(4)(B) Without Regard to "Work Preservation" or "Union Standards" Motives.

The decision holds that Union pressure to restrain members of the Association from towing Berman's barges unless they were manned by two persons does not violate Section 8(b)(4)(B) as a matter of law because there was evidence from which a jury could find that the Union's motive was "work preservation" and "maintaining union standards". (App. 15-16) However, this Court's decision in *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971), holds that once it is shown that the union's object is to force the primary employer to change its policy on work assignments, union pressure upon neutral employers violates Section 8(b)(4)(B).

The decision below avoids the *Local 825, Operating Engineers* rule by drawing an analogy to cases that authorize restrictions on subcontracting of unit work negotiated by a union and employer. (App. 15-16) The analogy to subcontracting is erroneous because restricting the way in which an employer subcontracts unit work is fundamentally different from restraining the way in which an employer conducts its business.

In *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 215 (1964), this Court cautioned that the duty to bargain over an employer's subcontracting out of unit work is not authority for restrictions on "other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." The invocation of cases involving the

subcontracting of unit work to authorize the Union's pressure on Association members not to tow Berman's barges unless they met Union manning standards is a dangerous analogy because it authorizes union disruption of business dealings between two companies in the absence of subcontracting. If the Union can act to advance its industry-wide goals for uniform working conditions by preventing the towing of non-union barges unless they are manned to its liking, then any union can restrict the basis on which its members will work when they come into contact with another union.[12]

The writ should be granted to decide whether the law announced in subcontracting cases under Section 8(b)(4)(B) can properly be applied generally in this manner. The question is of exceptional importance because union demands on employers to restrict business practices for the union's benefit are an everyday part of labor relations and the far-reaching restrictions authorized by the decision below will cause substantial disruption unless prohibited.

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[12] *See United Marine Division, Local 333*, 226 NLRB 1214 (1976) in which the NLRB held that the identical conduct violated Section 8(b)(4)(B) and Section 8(b)(3) of the NLRA. Although the court of appeals noted the *MOTC* decision, it did not explain why its decision departed from it.

IV.

Increasing Salaries Received by Management of a Closely Held Business Are Irrelevant to Whether or Not a Company Is Injured in Its Business or Property Under Clayton At §4 and Section 303 of the LMRA.

The decision below holds that the jury could properly consider the claim that salaries received by Berman's management showed Berman was not injured as an exercise of trial court discretion under Rule 403 of the Federal Rules of Evidence. However, to treat such an argument as an exercise in discretion allows juries to decide cases on a ground irrelevant to whether or not a business is injured within the meaning of Clayton Act § 4, 15 U.S.C. § 16 and Section 303 of the LMRA, 29 U.S.C. § 187. Injury under the antitrust and labor laws is a specific and logical chain of causation between the violation and the injury alleged and plaintiffs are prohibited from a claim of injury not so causally connected to the violation. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Here, the injury is Berman's loss of business from, and inability to hire the services of, the defendant corporations. Defendants should have been restricted to arguing whether or not the *injury claimed occurred* and prevented from arguing to a jury that increasing salaries to management show no injury. The decision below means that a business injured by an antitrust violation but, nevertheless, able to pay substantial salaries in spite of the injury, has no remedy[13] for the violations because a jury is in no position

[13] Petitioners' post-trial request for injunctive relief under Clayton Act §16, 15 U.S.C. §26, relief that depends on threatened injury, was also denied.

to determine the legal and economical falseness of such an argument.[14] The writ should be granted for this reason.

CONCLUSION

WHEREFORE, petitioners Berman Enterprises Inc., Standard Tank Cleaning Corp., and General Marine Transport Corp., respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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[14] The error of the argument is emphasized by the evidence necessary to have made it relevant: the only way the salaries could have been relevant is if they showed an alternative explanation of why defendants refused to deal. For example, if there were evidence that the defendants learned that Berman's executives were receiving increasing salaries and refused to deal not as a result of an agreement with the union, but because they were offended by the size of the salaries, then there would be a causal connection to the injury claimed for the jury to consider.

APPENDIX

Decisions of the Courts Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 112—September Term, 1980

(Argued December 3, 1980 Decided February 25, 1981)

Docket No. 80-7260

BERMAN ENTERPRISES INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Plaintiffs-Appellants,

—v.—

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, MCALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPORTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Defendants-Appellees.

Before:

OAKES and MESKILL, *Circuit Judges,* and WERKER, *District Judge.**

* Of the United States District Court for the Southern District of New York, sitting by designation.

Opinion of Court of Appeals

OAKES, *Circuit Judge:*

This appeal concerns labor practices and collective bargaining provisions in the marine transportation service industry. Appellants are three affiliated companies, Berman Enterprises Inc. (Berman), General Marine Transport Corp. (General Marine), and Standard Tank Cleaning Corp. (Standard Tank). They allege antitrust violations by Marine Towing and Transportation Employers' Association (Association), a multiemployer bargaining organization, certain of the Association's members, and Local 333, United Marine Division, International Longshoremen's Association (Union), a union representing vessel employees. Appellants also allege labor law violations by the Union. The United States District Court for the Southern District of New York, Robert W. Sweet, Judge, at the conclusion of the evidence dismissed all elements of the antitrust claim except that portion alleging conspiracy to refuse to deal with Berman. Thereafter the jury returned verdicts against Berman and the companies affiliated with it on the remaining antitrust claim and on the labor claim. The court then denied the appellants' request for injunctive relief. On appeal the three affiliated companies argue that the antitrust claim should not have been dismissed, that the court should have directed a verdict for the appellants on the labor claim, and tha evidence concerning salaries of Berman's officers should neither have been admitted nor have been the subject of an argument about Berman's damages. We cannot accept these contentions and, accordingly, affirm the judgment below.

I. FACTS

Berman, General Marine, and Standard Tank are all owned by Standard Marine Services, Inc., which in turn is owned by Evelyn Berman Frank and her brothers. Berman operates tugs, barges, and harbor tankers in New York harbor; General Marine operates two ships which dispose of sewage sludge produced by municipal customers; and Standard Tank operates a vessel-cleaning facility and one tank-cleaning vessel.

General Marine was a member of the Association at the time the dispute in question arose, but Berman and Standard Tank were not and the Union did not represent their employees.[1] The Union and the Association have three labor contracts covering employees on tugs, barges, and self-propelled tankers, respectively. Berman, or its predecessor, and the appellee Association member corporations have for many years been customers as well as competitors of one another, hiring each other's tugs or barges from time to time, but also competing for business from third parties. Berman operates with one man on a barge and four-man barge crews, whereas members of the Association, pursuant to a collective bargaining agreement with the Union, operate with two men on a barge and a six- or seven-man barge crew.

Well before April 1, 1976, the date of the new collective bargaining agreement with which we are concerned here, the Union unsuccessfully sought to require Berman to

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1 When General Marine employees worked on Berman vessels, General Marine made payments to the Union-Association pension funds but the employees worked according to Berman wages and working conditions. Since January 1977 Berman employees' bargaining representative has been Marine Engineers Beneficial Association (MEBA).

cease towing unmanned vegetable oil barges[2] of MOTC Acquisitions Corp. (MOTC). The Union had decided that all barges with less than a certain carrying capacity should be manned by a crew of two. A federal district court, however, enjoined the Union from so coercing Berman, and the National Labor Relations Board subsequently found that the Union had engaged in a secondary boycott unlawful under section 8(b)(4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4), as well as having violated other provisions of the NLRA, *United Marine Division Local 333,* 226 N.L.R.B. 1214 (1976). Shortly thereafter the Union, claiming that it had previously terminated its labor contract, struck General Marine but again was unsuccessful; a federal district court enjoined the strike and this court upheld the injunction on appeal, *General Marine Transport Corp. v. Local 333, United Marine Division,* No. 75-7559 (2d Cir. Mar. 10, 1976). General Marine later obtained favorable holdings on this matter both before the Board, which found violations of sections 8(d), 8(b)(3), and 8(b)(1)(A) of the NLRA, *United Marine Division Local 333,* 228 N.L.R.B. 1107 (1977), and before an arbitrator.

In January 1976 the Union made certain demands upon the Association for contract provisions to be incorporated in the new collective bargaining agreement, which was to commence on April 1, 1976. This was followed by a Union demand made to General Marine that all the Berman companies' crew members, except those on the tank-cleaning vessel, join the Union and that all hiring be done through the Union hiring hall. Further negotiations, accompanied by the litigation noted above, resulted in an

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2. "Vegetable oil barges" included any barge under 55,000 barrels used in the animal, vegetable, or fish oil trades.

impasse, with General Marine refusing to resign from the Association despite the Association bargaining committee's statement that unless General Marine resigned, the Association would enter into a contract that satisfied the Union. Finally on March 26, 1976, the Union and the Association entered into a Memorandum of Agreement containing what we will call the "vegetable oil" and the "affiliates" clauses, the first in effect requiring two men on vegetable oil barges carrying less than 55,000 barrels[3] and the second requiring affiliates of Association members to operate under the contract.[4]

After the Union ratified the new contract, the Union president wrote General Marine to demand compliance with the affiliates clause and to list fourteen Berman-General Marine vessels which he claimed were covered by the Union-Association contract. At about the same time, in early April 1976, the Union membership was informed about and advised to enforce the vegetable oil clause, on pain of discipline. Following General Marine's response that the contract exceeded the scope of the Association's

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3 The "vegetable oil" clause read:

> 9. *Section 29. Vegetable Oil Barges.* No vessel operated under this contract shall tow any barge under 55,000 barrels used in the animal, vegetable, or fish oil trades unless there are two men aboard the barge at all times.

This clause was applicable to the Berman petroleum barges because they could be cleaned to carry vegetable oil.

4 The "affiliates" clause read in part:

> 8. *Section 1. Application Agreement*
>
> This Agreement applies only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity.

It went on to provide for strikes against noncomplying employers.

bargaining power and constituted a group boycott, the Union again struck General Marine. The Union also advised Association members not to deal with Berman and specifically not to tow Berman barges with less than two men aboard.[5] Subsequently, in June 1976, Berman filed a petition with the Board for an election to determine whether its employees wanted to be represented by a labor union. The Union opposed such an election, but the Board's Regional Director ordered an election and the Berman employees chose Marine Engineers Beneficial Association (MEBA) as their union.

This suit by Berman, General Marine, and Standard Tank is in two counts—the first charges all defendants with a combination in restraint of trade under section 1 of the Sherman Act, 15 U.S.C. § 1, and seeks damages under section 4 of the Clayton Act, 15 U.S.C. § 15, and an injunction under section 16 of the Clayton Act, 15 U.S.C. § 26. The second count charges the Union alone with participation in a secondary boycott in violation of section 303 of the Labor Management Relations Act

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[5] In a column in a Union newspaper, the Union president further explained the Union-Association contract:

> For several years, we have been having problems with certain companies who have been trying every way possible to duck our contracts and the wages, benefits and working conditions our membership is entitled to under those contracts. The actions of these companies, and some of the men employed by them, have a ripple effect throughout the industry. The companies have been able to undercut the rates of companies abiding by the contract, and thus expand and take work away from others resulting in a loss of jobs for our members. The new clauses and clause revisions are designed to strengthen the contract against this type of action, making the companies competitively equal and thus providing greater job security for our membership. I have said in the past that knowing your contract is very important. It now becomes even more important that every member know and abide by this contract.

(LMRA), 29 U.S.C. § 187, and seeks damages from the Union.

The court below held that the vegetable oil and the affiliates clauses, as well as the actions taken under them, were not themselves antitrust violations in light of the so-called "labor exemption" to the antitrust laws,[6] and, alternatively, that these clauses did not have the anticompetitive purpose or effect necessary to violate section 1 of the Sherman Act, though they could be used as evidence of an agreement to refuse to deal, an agreement which the jury specially found did not exist. The jury also specially found against Berman and its affiliated companies on three questions submitted under the labor law count.[7]

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[6] As explicated in *Adams, Ray & Rosenberg v. William Morris Agency*, 411 F. Supp. 403, 407-08 (C.D. Cal. 1976), where litigation involves only union activities, the union may claim a statutory exemption under sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115; where litigation involves the activities of a union and employers, the defendants may claim a "nonstatutory exemption," *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 622-23 (1975). *See generally*, R. Mann, B. Powers & B. Roberts, *The Accommodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 9 Seton Hall L. Rev. 744 (1978).

[7] The three questions, all answered negatively by the jury, were:

> 4. Did Local 333 induce or encourage its members to refuse to work for their employers when asked to work on Berman vessels or threaten, coerce or restrain the Association or the corporate defendants in order to:
>
> a. Force Berman to become a member of the Association?
>
> b. Force Berman to recognize Local 333 as the representative of its employees?
>
> c. Force the Association or the corporate defendants to cease doing business with Berman?

Following the verdict, the trial judge denied motions for a new trial, for judgment notwithstanding the verdict against the Union on the labor law count, and for injunctive relief.

II. DISCUSSION

A. *Antitrust Claim*

Berman argues that the vegetable oil and the affiliates clauses had the purpose of restraining Berman from charging lower prices and from taking work away from Union members, and that the clauses had the effect of excluding Berman as a competitor of Association members and restricting the conditions under which Berman could hire an Association tug.

Berman begins with the assertion that the nonstatutory labor exemption is not available to protect a combination, between a union and a nonlabor group, that has an anticompetitive purpose or effect on the business of another, *Allen Bradley Co. v. Local 3, IBEW,* 325 U.S. 797, 809-10 (1945), particularly in light of the narrow construction to be given exemptions from the antitrust laws, *Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 231 (1979). This argument has two prongs. The first is that the agreement here imposed wages, hours, and working conditions on nonparty employers and, accordingly, was not exempt from the antitrust laws. *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 40 (1978) (upheld Federal Maritime Commission finding that multiemployer bargaining unit-union contract requiring nonparties to comply with fringe benefit programs and other work rules for hiring-hall work force members is not protected by the nonstatutory exemption and is subject to section 15 of the Shipping Act, 46 U.S.C. § 814, which regulates anticompetitive agreements in certain maritime industries); *United Mine Workers v. Pennington,* 381 U.S. 657, 665-66 (1965) (union forfeits its exemption from antitrust laws when it agrees with one set of employers to impose a wage scale

on other bargaining units). The second prong relies on the analysis in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965),[8] and *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 622-23 (1975), which concludes that agreements reached on nonmandatory subjects of bargaining—matters other than wages, hours, and working conditions—are not within the nonstatutory exemption if they constitute restraints on competition in a business market. *See also Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 801 (2d Cir.) (*Jewel Tea-Connell* analysis followed), *cert. denied*, 434 U.S. 923 (1977). Thus Berman's point is that the challenged agreement fell outside the scope of the nonstatutory labor exemption to the antitrust laws: it failed the *Pennington* test because it set employment terms for nonparty employers and it failed under the *Jewel Tea-Connell* analysis because it embraced nonmandatory subjects of collective bargaining. We disagree.

Both of the disputed clauses represented legitimate union objectives because they dealt either with working conditions, *Jewel Tea*,[9] or job preservation, *Intercontinental Container Transport Corp. v. New York Shipping Association*, 426 F.2d 884, 886-88 (2d Cir. 1970) (contract

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[8] Although Justice White spoke for only a three-person plurality, his statement in *Jewel Tea*, 381 U.S. at 689-90, is considered to be a classic formulation of the standard for determining applicability of the labor exemption. According to Justice White, the issue is whether the subject matter of the restriction

> is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

[9] See note 8 *supra*.

held exempt from the antitrust laws under the labor exemption because the union had a right to preserve the jobs of its members). Any indirect effect upon Berman was permissible, especially because the contract did not forbid the use of nonunion members. *See California Dump Truck Owners Association v. Associated General Contractors,* 562 F.2d 607, 613-14 (9th Cir. 1977) (clause valid even though it might have some effect on the hiring of nonunion members, because it did not preclude the hiring of these members). The vegetable oil clause did not impose any requirements on any nonparty to the collective bargaining agreement. Rather, it was directed at union employers (as discussed further in section II. B. of this opinion) and was designed to prevent erosion of manning standards by outside economic pressure, to protect jobs, and to promote safety at sea.[10]

The affiliates clause is more troublesome. There is case law holding that broad clauses such as this one deal with nonmandatory subjects, at least when they go beyond the language "necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another [place] to evade standards and wages at the [present place of employment]." *Lone Star Steel Co. v. NLRB,* No. 77-1667, slip op. at 33 (10th Cir. Jul. 28, 1980) (clause applying contract to all facilities presently owned or hereafter acquired by the employer and facilities owned by subsidiaries and affiliates, upon recognition of the union, whether or not such operations compete with the work of unit employees, was not a mandatory subject), *cert. filed,* 49 U.S.L.W. 3456 (U.S. Dec. 10, 1980) (No. 80-940); see also *Amax Coal Co. v. NLRB,*

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[10] There was evidence that tug boat crews felt that unmanned barges were unsafe to tow. This suggests that barges manned by a single person might also be unsafe.

614 F.2d 872, 883-84 (3d Cir. 1980) (clause applying contract to employees who work in other than the certified unit and who select the union held not to be a mandatory subject), *cert. filed,* 49 U.S.L.W. 3353 (U.S. Oct. 27, 1980) (No. 80-692). Appellees would distinguish *Lone Star Steel* and *Amax Coal* from the instant case on the basis that the former are bargaining cases under section 8(b)(3) of the LMRA. But the *Jewel Tea-Connell* analysis relates us back to the issue of mandatory versus nonmandatory subjects of bargaining and, thus, these cases are relevant.

Although the language in the affiliates clause here may appear broader than necessary to fulfill legitimate union objectives, as applied to Berman the clause served legitimate goals of the Union. The reason for this is that General Marine and Berman treated employees as fungible, that is to say, the two affiliated companies used employees interchangeably.[11] There was also some transferring back and forth of vessels between General Marine and Berman. Berman was not an independent, unrelated

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[11] Mrs. Frank, president of all three affiliated companies, testified as follows:

Q. The directors of Berman and the directors of General Marine are the same people, are they not?

A. That's right.

Q. You as the chief operating officer of Berman and of General Marine use the employees of Berman and General Marine fungibly [*sic*] and interchangeably, is that correct?

A. That's correct.

Q. You have Berman employees doing General Marine work and General Marine employees doing Berman work, is that correct?

A. I would say mostly it was General Marine doing Berman work.

Q. In any event, you did use them fungibly [*sic*] and interchangeably, is that correct?

A. That's right, with union consent.

employer. Under these circumstances, there was in reality but a single employer, with interrelated operations, common management, and centralized control of labor relations, *see South Prairie Construction Co. v. Local 627, Operating Engineers,* 425 U.S. 800, 802 n.3 (1976) (quoting *Radio Union v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256 (1965)), and the affiliates clause vitally affected working conditions and wages of the Union members. At least for purposes of application of the antitrust exemption, it was a legitimate union objective to protect employees against shifts of work days (and vessels) designed to avoid the standards and wages established in the collective bargaining agreement. Furthermore, cases such as *Federal Maritime Commission* and *Pennington* are not applicable here because they involved employer bargaining groups and unions conspiring to injure truly separate concerns. Berman's underlying factual premise that it was an unconnected nonparty is simply not true.

We also agree with the court below, in the alternative, that even if the vegetable oil and the affiliates clauses do not fall within the labor exemption, there was no proof of an antitrust violation under the rule of reason, which would be applicable here. *See, e.g., National Society of Professional Engineers v. United States,* 435 U.S. 679, 687-88 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50 & n.16, 58-59 (1977). Despite the Union newspaper column's language quoted in the margin,[12] we fail to discern either an anticompetitive purpose or an anticompetitive effect. The Supreme Court, in *National Society of Professional Engineers,* 435 U.S. at 687-88, made it clear that the inquiry under the

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12 See note 5 *supra.*

rule of reason is directed at the challenged restraint's overall impact on competitive conditions, rather than whether a particular party has been restrained by the conduct at issue. In the instant case, neither the vegetable oil nor the affiliates clause constituted an unreasonable restraint of trade. There was a good deal of testimony to establish that the true purposes behind the clauses were job preservation, maintenance of working conditions, and safety, none of which is anticompetitive in nature. As for the effect of the clauses, they were in effect for only a short period of time, and to the extent that Berman suffered any drop in the volume of its business, the evidence clearly demonstrated that it was due to conditions unrelated to this dispute. *See generally* D. Leslie, *Principles of Labor Antitrust,* 66 U. Va. L. Rev. 1183 (1980) (suggesting that an antitrust violation may be found only if the union's use of a restraint is part of a scheme to regulate a product market by controlling prices, outputs, or market allocations).

B. *Labor Law Claim*

In light of the special jury verdicts set forth in the margin,[13] Berman's labor law claim must be based essentially on establishing that it was entitled to a directed verdict on the secondary boycott issue and that the jury charge confused lawful primary activity with unlawful secondary activity. The alleged violation of section 303 of the LMRA, 29 U.S.C. § 187, depends on whether the Union violated section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4).

Under *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 (1967), it is now well settled that

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13 See note 7 *supra.*

section 8(b)(4)(A) (which incorporates by reference section 8(e)) and section 8(b)(4)(B) of the NLRA are intended to prohibit not agreements or actions directed toward the primary employer, but secondary objectives such as the exertion of pressure on a neutral employer. The key question, therefore, is whether the provisions that the Union sought were aimed at preserving work and maintaining working conditions or whether they were tactically calculated by the Union to satisfy its objectives elsewhere. *Id.* at 644-45. In *NLRB v. International Longshoremen's Association,* 48 U.S.L.W. 4765, 4769 (U.S. June 20, 1980), the Supreme Court stated that

> a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test . . . .

And the Circuit Court for the District of Columbia, discussing contract clauses analogous to the "two men on a barge" requirement in the instant case, noted that

> [t]he test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as whether it "will directly benefit employees covered thereby," and "seeks to protect the wages and job opportunities of the employees covered by the contract." We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards [the union] has bargained for," or instead

> "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."

Painters District Council 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964) (footnotes omitted). Although Berman claims that the Union's conduct fails these tests, the evidence does not sustain this argument.

Berman complains about Union pressure on the Association to force Association members not to tow Berman barges or to hire its tugs. Berman asserts that the history of the relationship between it and the Union shows that pressure on Association members not to tow Berman barges was exerted solely to impose manning and other labor requirements on nonunit vessels and nonunion employees. Indeed, Berman contends that any work preservation argument regarding this point is frivolous because when Berman hired an Association member's tug to tow a Berman barge, Berman gave work to, rather than took work away from, Association members' employees. But this is all a one-sided interpretation of the facts.

The "idle tugs"[14] and the "two men on a barge" requirements were designed to preserve jobs for the bargaining unit, protect Union tugmen from exposure to serious safety risks, and prevent erosion of contractual manning standards, *see NLRB v. International Longshoremen's Association,* 48 U.S.L.W. at 4769; *NLRB v. National Maritime Union,* 486 F.2d 907, 912 (2d Cir. 1973) ("subcontracting clauses . . . which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid"), *cert. denied,* 416

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[14] This refers to the Union effort to obtain a commitment from employers not to hire outside tugs when their own tugs stood idle.

U.S. 970 (1974); *Painters District Council 48*, 328 F.2d at 538-39 (" 'to limit the work to employers maintaining labor standards commensurate with those required by the Union' was within 'the area of legitimate union claim' "). And as for Berman's claim that it was giving work to Association employees, this ignores the sometimes competitive relationship between Berman barges and Association barges, and the fact that use of Berman's undermanned barges may have taken jobs away from the bargaining unit. In short, as the Union points out, the Union's effort to secure the "idle tugs" rule was to preserve work and its pressure for the "two men on a barge" requirement was analogous to a legitimate "union standards" objective rather than to a prohibited "union signatory" purpose, *see National Maritime Union*, 486 F.2d at 912. The Union's conduct also is not vulnerable to Berman's "right to control" argument because the Union did not coerce Association members to obtain work for the Union that the members had no right or power to assign, *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 521-28 (1977).

Certainly there was ample evidence to support this view that the Union's objectives were primary rather than secondary and thus, in our opinion, the trial judge properly sent the labor law issue to the jury. Furthermore, the jury charge correctly stated that if the Union's sole purpose was work preservation then the activity was primary and protected, but that if the Union's purpose was to force Berman to recognize the Union or to require Berman to join the Association then the jury had to find in favor of Berman. *See National Woodwork*, 386 U.S. at 644-45.

C. *Evidence on Salaries*

The final issue is an evidentiary one. Berman claims that the court erroneously permitted the appellees to present evidence about the salaries of Berman's officers to demonstrate that Berman had not been injured by the alleged antitrust and labor law violations and that this evidence unfairly prejudiced the jury. We cannot agree with this contention. The evidence on salaries was relevant to Berman's operations because Berman was a close corporation; it was also admissible to impeach the credibility of Berman's president, Mrs. Frank. It was within the trial judge's discretion to decide that the probative value of the evidence was not outweighed by unfair prejudice, *see* Fed. R. Evid. 403. As for the cases cited by Berman, *see, e.g., United States v. Stahl,* 616 F.2d 30, 31-33 (2d Cir. 1980); *Koufakis v. Carvel,* 425 F.2d 892, 900-05 (2d Cir. 1970), they are inapposite. In each of those cases the plaintiff had gone to great lengths to appeal to class prejudice in characterizing the defendant as a very rich man. Here, the salary information was simply one of many pieces of evidence and it was submitted for limited purposes, without either undue emphasis or unscrupulous references.

Judgment affirmed.

Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of May 13, one thousand nine hundred and eighty-one.

No. 80-7260

BERMAN ENTERPRISES INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Plaintiffs-Appellants,

vs.

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, MCALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPORTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by coun-

sel for the plaintiffs-appellants, Berman Enterprises, Inc., Standard Tank Cleaning Corp., and General Marine Transport Corp.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro, Clerk

Bench Opinion of District Court

[1169]

October 11, 1979

By Hon. Robert W. Sweet
on Defendants' Motion to Dismiss

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The Court: Gentlemen, first of all, I want to thank you all very much for the very helpful briefs that you have given me and also for the argument which was again very useful. And I want to hasten to say what I guess will become obvious in the course of these remarks, and that is that I don't regard this as a pro forma motion to dismiss, and it's been apparent, I think, all along that that was the case.

Also I should say, by way of preface, I'm sure all of you are very familiar with the views of the Court of Appeals on the subject of motions to dismiss, and there is obviously an important factor in a case, in any case, but in particular in a case like this, particularly in an area as difficult as this one, the risk of precluding the Court of Appeals from having a full record on which they can make a determination is [1170] obviously a factor which has to be taken into consideration, and I take that very seriously, and that is one of the elements of this decision.

The Court of Appeals, so far as the circuit has indicated to us in Commerce Tankers v. NMU, and the difficulty which faces me now, that there Judge Feinberg stated, "Both these assertions"—that is, the assertions under a factual situation similar to this—"raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of these conflicting policies reflected in these laws has aptly been called a troublesome and unruly issue."

And I certainly find it so.

Now, with respect to the events relating to the MOTC strike, the difficulty with the union, with respect to that difficulty, with respect to the vegetable clause in the '76 contract, and with respect to the affiliation clause in the '76 contract, and those are all shorthands which you gentlemen understand, I conclude that those are properly subject to the labor exemption, and were I wrong in that assumption I would still reach the conclusion that a cause is not set forth as a result of those elements [1171] alone, for there has been, in my view, an insufficient showing of any anti-competitive purpose or effect under the rule of reason which would apply, if I were wrong, and they could be considered to be antitrust violations.

However, that in my view does not end the case, although I recognize that there is argument to the contrary. It seems to me that there remains a problem, and that is as to whether or not there is enough to go to the jury on a charge of a refusal to deal.

In that regard, let me say that I believe the case—I will grant the motion with respect to Eklof, Diesel and Bouchard, for I feel that there has been no showing, even if it be assumed for the sake of this motion, that a cause has been set forth, that is, that there is a violation, there has been on the numbers an insufficient showing of any proximate cause of injury resulting from that violation, if the violation were to be found.

Mr. Pollack: Turecamo also, your Honor?

The Court: No. Turecamo is in a different situation because there the numbers can be argued to create an injury, in my view.

[1172] Now, that leaves you with where we are at the moment. I also believe that an agreement, if you will, and

using "agreement" to mean a contract, combination, restraint of trade, etc., etc., between the Association and the union or between the union and individual companies to establish the manning procedures on the barges, that is, to refuse to tow unmanned barges, I believe that also is covered by the labor exemption. However, that still, in my mind, although I think it is difficult, does not necessarily dispose of the case; and, incidentally, I would propose that—I will try to frame instructions for the jury somewhat along the lines of what I am now telling you all when it becomes necessary to do that, for I do think that there is a case to go to the jury, and that is as to whether or not there is an agreement or contract or combination in restraint of trade to refuse to deal with Berman.

The evidence which I see from which the jury might, it seems to me, infer such a refusal to deal is the Cornette conversation with Elzer, the O'Hare conversation with Bushey, the clauses in the contract, though I believe that they are part of the labor exemption, I also believe that they could [1173] be evidence of an intent, and the arguable loss of business and the fact of the refusal to deal.

Now, I have been troubled by the fact that there has not been a totality of a refusal to deal. Obviously there have been dealings, but I believe that there is enough from which the jury might infer that there has been a diminution of business constituting a refusal to deal.

In reaching that decision, I, of course, am compelled to view the facts in the most favorable light possible for the plaintiffs, and, indeed, I may have done so even in a more favorabe light than the plaintiffs themselves, but nonetheless, that is what I have decided, gentlemen, that there will be a case of a refusal to deal that will go to the jury as I

have indicated. But there will be instructions with respect to labor exemptions when the time comes.

Now, how are we going to proceed this afternoon? Obviously we have got these preliminary matters, and then after that.

Mr. Bernstein: Well, I have these—

The Court: Yes, I say, preliminary matters, exhibits, whatever you want to call them.

Oh, by the way, yes, my clerk points out to [1174] me I didn't say anything about the Labor-Management Relations Act. Obviously from what I have said, I believe that there is an issue that should go to the jury as to whether or not the union sought to compel Berman either to join the Association or to compel its employees to join the union.

Yes. Mr. Waldman?

Mr. Waldman: Your Honor, I guess I am thinking out loud now, I have to have some time to consider how I want to proceed. I had prepared—I guess there is no point in keeping it secret because it isn't a secret—my intent was to go forward this afternoon with witnesses who would deal with the question of the safety implications of the one-man-on-a-barge situation, bearing in mind that we have argued thus far the manning requirement, the job preservation, there was a second arrow in that quiver, and that was safety. It strikes me that the court's ruling may make that academic unless I want to be sure I have a stronger record on appeal—

The Court: You do what you want, but despite my determination I would not consider it irrelevant.

Mr. Waldman: But your present inclination, [1175] or your ruling is you will not allow that issue to go to the jury.

Bench Opinion of District Court

The Court: No, I will instruct the jury that if they find that the purpose of the union and the defendants was to enforce the manning provision, the unmanned-barge provision, forgive me if the language isn't proper, but if that was the purpose of the refusal to deal, if they find a refusal to deal, they must find for the defendants.

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Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 272 (RWS)

BERMAN ENTERPRISES, INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Plaintiffs,

vs.

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,

Defendants.

SWEET, *D.J.*

Plaintiffs Berman Enterprises, Inc. ("Berman"), Standard Tank Cleaning Corp. ("Standard Tank"), and General Marine Transport Corp. ("General Marine") have moved for a new trial on all issues under Rule 59, Fed.R.Civ.P., for a directed verdict against defendant Local 333, United Marine Division, International Longshoremen's Association ("Local 333") under Rule 50, Fed.R.Civ.P., and for entry of findings of fact, conclusions of law and an injunction against certain activities by the defendants. The motions are denied.

The motions under Rules 50 and 59 for a new trial and for a directed verdict present no facts or legal theories which were not carefully reviewed and adjudicated at trial. In the absence of new grounds for relief, the court declines to alter its rulings on these admittedly complex legal is-

sues, or to disturb the findings reached by the jury after careful deliberation. Accordingly, these motions are denied.

Berman has also moved for entry of factual findings and conclusions of law in accordance with Rule 52, Fed.R.Civ.P. Berman claims that the court must consider separately a legal theory which was not presented to the jury and which calls for entry of injunctive relief independently of the jury's verdict. The defendants have submitted proposed findings of fact, but continue to oppose the motion.

Although Berman's suit is for injunctive relief as well as damages, Berman is not entitled to separate factual conclusions by the court in this case. It has been consistently held that where legal claims are combined with equitable claims, "the legal issues are to be tried first and the findings of the jury are binding on the trier of the equitable claims." *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 986 n. 7 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977). *See also Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Commercial Iron & Metal Co.* v. *Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir. 1978), *cert. denied*, 99 S. Ct. 1229 (1979); *Southland Reship, Inc.* v. *Flegel* 534 F.2d 639, *reh. denied*, 539 F.2d 710 (5th Cir. 1976); *Robine* v. *Ryan*, 310 F.2d 797 (2d Cir. 1962).

Berman demanded a jury trial on all issues. The jury found that there was no agreement, combination or conspiracy among the defendants to refuse to deal with Berman in violation of the antitrust laws. The jury also found that Local 333 did not induce or encourage its members to refuse to work on Berman vessels or threaten, coerce or restrain either the Marine Towing and Transportation Employees' Association (the "Association") or the corporate defendants in order to force Berman to become a member

of the Association, to recognize Local 333 as the representative of its employees or to force the Association or the corporate defendants to cease doing business with Berman. In short, the jury found against Berman on all factual issues which could provide a predicate for the issuance of injunctive relief in this case. The jury's conclusions are amply supported by the evidence adduced during this three week trial.

Under these circumstances, there is no basis for entry of factual findings, conclusions of law or an injunction which would necessarily contradict the explicit findings of fact reached by the jury. Therefore the motion under Rule 52 is denied.

IT IS SO ORDERED:

/s/ ROBERT W. SWEET, *U.S.D.J.*

Dated: New York, New York
March 3, 1980

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civil 272 (RWS)

BERMAN ENTERPRISES, INC., et al.,

Plaintiffs,

—against—

LOCAL 333 UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,

Defendants.

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Robert W. Sweet, United States District Judge, and a jury, on September 26, October 2, 3, 4, 9, 10, 11, 15, 17, 18 and 19, 1979, and defendants Diesel Vessel Operators, Bouchard Transportation and Eklof Marine Corp., having moved to dismiss, and said motion having been granted, and at the conclusion of the evidence the jury having returned a verdict in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed in its entirety.

Dated: New York, N.Y.
October 26, 1979

/s/ SAMUEL F. BURGHARDT, *Clerk*

Opposition

1

No. 81-279

Office-Supreme Court,
FILED
SEP 28 1981
ALEXANDER L. STEVA
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BERMAN ENTERPRISES, INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Petitioners,

v.

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, MCALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPORTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION IN OPPOSITION

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WALDMAN & WALDMAN, P.C.
Of Counsel

Questions Presented

1. (a) Whether the courts below properly held that an employer association and a Union did not violate the Sherman Act as a matter of law in voluntarily agreeing to apply their collective bargaining agreement to subsidiaries and affiliates of contracting employers, when the evidence showed that the commonly owned and operated plaintiff corporations—one of which was an Association member and the other of which was not—interchanged vessels and employees at will, made fringe benefit contributions for some but not all employees on both sets of vessels, formed new vessel-owning or operating companies without informing the Union and the Association, and in general frustrated the Union's ability to know which vessels and personnel were covered by the contract and to enforce the agreed-upon terms and conditions.

(b) Whether the courts below correctly held that this challenged contract provision did not, in any event, have the requisite anticompetitive purpose or effect, when it was never applied to plaintiff Berman, never affected Berman's operations, caused Berman no damage, and was shortly rendered ineffective as a matter of law through an NLRB representation proceeding under which another union was certified to represent Berman's employees.

2. (a) Whether the courts below properly held that a negotiated collective bargaining provision providing that employers in the contracting Association would not tow vegetable oil barges without two persons aboard did not violate the Sherman Act as a matter of law, when the evidence showed that the Association members operating vegetable oil barges had two employees aboard, the Union was concerned about maintenance of that standard man-

ning scale, and the use of less than two persons created safety hazards to employees in the Union's bargaining unit.

(b) Whether the courts below correctly held that this challenged contract provision did not, in any event, have the requisite anticompetitive purpose and effect, when Berman never operated vegetable oil barges and the challenged provision was never applied to Berman, never affected its operations, caused Berman no damage, and shortly after its adoption was formally deleted from the collective bargaining agreement.

3. Whether the trial court properly submitted to the jury, under unchallenged instructions, the issue whether the Union's efforts to maintain its long-standing contractual manning standard of two employees aboard petroleum barges, constituted work preservation which was not violative of Section 8(b)(4) of the NLRA or a secondary boycott violative of that Section.

4. Whether the trial court properly permitted defendants to show the large, increasing salaries paid to the several family members employed as officers and executives of Berman, after Berman's officers had testified to the losses allegedly incurred by it, its declining credit standing, its cash flow problems, its recourse to borrowing from friends, and the personal sacrifices of its principal owner and President in selling her own home.

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IN THE

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OCTOBER TERM, 1981

NO. 81-279

BERMAN ENTERPRISES, INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION IN OPPOSITION

Statement of the Case

Nature of the Case.

In a two-count complaint, plaintiffs[1] charged all defendants with a concerted refusal to deal in violation of the

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[1] Only Berman sought damages in this action. The other two plaintiffs sought only injunctive relief against the contract clauses. By the time of trial the injunction claim had long since been mooted.

Sherman Act and charged defendant Local 333 with a secondary boycott in violation of Section 303 of the Labor-Management Relations Act of 1947, based on identical allegations.

After a three-week trial, both claims were submitted to the jury under a series of special verdict questions to which plaintiffs took no exception. The jury decided against plaintiffs on all issues (A 1584-1585).[2]

Plaintiffs raise no question as to the correctness of the District Judge's charge to the jury. Their petition centers on two clauses included in the 1976 collective bargaining agreement between Local 333 and the multi-employer Association with which the Union negotiates. The petition creates the misleading impression that these clauses were the subject of a separate antitrust claim which the trial court refused to submit to the jury. That is not so. Plaintiffs alleged a single antitrust count, the thrust of which was that the defendant corporations, at the instigation of the Union, refused to do business with Berman; and that was the burden of their case throughout the lawsuit (A 19-20). The contract clauses were simply two items of evidence adduced in support of that claim.

Neither contract provision, if applied to Berman, would have caused Berman's business with the other defendants to have ceased or diminished or had any other effect alleged in the complaint. But neither clause was ever applied to Berman or enforced against it. Plaintiff's own President and principal stockholder testified flatly that neither clause had any impact upon Berman. One of the two clauses was deleted from the collective agreements less than three months after its negotiation and the other was ineffective

[2] Numbers preceded by "A" refer to page numbers in the Joint Appendix in the Court of Appeals. Numbers followed by "a" refer to the Appendix to the petition.

from the outset and soon thereafter became inapplicable as a matter of law. Accordingly, the trial Judge correctly charged that these clauses in and of themselves, could not constitute an actionable Sherman Act violation, although he specifically instructed the jury that it could consider them as evidence of an antitrust combination.

Both the District Court and Court of Appeals also held, in full consonance with the decisions of this Court and the Courts of Appeals, that neither clause, in the circumstances of this case, violated the Sherman Act.

The only other contention pressed by plaintiff relates to what was termed the "two men on a barge" issue. Although their position is not made clear, they seem to urge that this Union effort entitled Berman to a directed verdict on the secondary boycott claim as a matter of law. Again, they do not challenge the jury instructions which faithfully mirrored the terms of the governing statute and the decisions of this Court.

The "Subsidiaries and Affiliates" Clause.

In 1969, several years before the incorporation of plaintiff Berman, General Marine, then the vessel-operating company of the Berman family, recognized Local 333 as the collective bargaining representative for the crew members aboard five named vessels (A 1564-1565, 1187). General Marine was a member of the Association and bound by its collective agreements with the Union (A 1241, 1189-1190). Several years later, the family formed Berman Enterprises, Inc., but gave the Union no notice of this fact and continued to deal with the Union—and other companies as well—in the name of General Marine (A 417-418, 456, 603-604, 1498-1525).

The plaintiff companies were commonly owned, managed and operated as an integrated enterprise; Evelyn Berman

Frank, President and principal stockholder, conducted the labor relations of all three. Corporate officers were paid salaries by one company to cover their work for all, and funds were shared by all entities as needed (A 528, 552-554, 669-671).

Mrs. Frank transferred both vessels and personnel back and forth between her operating companies "fungibly and interchangeably" (A 554, 556-558). When boats were shifted from one company to another, the Union was not advised (A 456-457, 603). Contributions to the collectively bargained pension and insurance funds were made in the name of General Marine, with no consistency, not only for crews aboard the sludge vessels—the nominal General Marine boats—but for employees on Berman tugs, barges and tankers as well (A 855, 861-862, 1498-1525).

The Union never knew which vessels and employees were within the bargaining unit covered by its Association agreement and which were not; and Union officials made no secret of their frustration on this score. Because of the confused status fostered by plaintiffs' mode of operation, the Union experienced difficulty in enforcing the agreement; and the employment conditions aboard plaintiffs' vessels did not comply with those prescribed by the collective agreement (A 290-291, 337).

Prompted at least in part by the elusive nature of the Berman-General Marine enterprise, the Union included among its contract demands in 1976 a proposal that "subsidiaries and affiliates" of Association companies be covered by the new agreement. During the course of negotiations, Mrs. Frank was offered the opportunity to withdraw from the Association so that her companies would not be bound by the contract; she was advised that, in light of Union pressures, the Association would probably agree to this demand (A 1280, 272-273, 279-282, 285-287). The Union

indicated that it would acquiesce in General Marine's withdrawal from the negotiations (A 293-294), although otherwise untimely under NLRB doctrine (A 1189); but Mrs. Frank declined to do so (A 319-320). After extensive negotiations, the clause was included in the 1976 agreement.

In early April, 1976, shortly after the making of the new contract, General Marine formally repudiated it, contending that the "subsidiaries and affiliates" clause constituted an improper attempt to enlarge the bargaining unit without its consent. Berman took the position that as a nonmember of the Association, it was not bound by the Association agreement, and Berman never adhered to the terms of that agreement (A 573-574, 1187-1189, 1530-1536).

In mid-April 1976, two weeks after the new agreement became effective, Berman recognized a rival labor organization, the Marine Engineers Beneficial Association (MEBA) as exclusive bargaining representative of all its employees. There followed a flurry of Labor Board activity: an unfair labor practice charge by Local 333; a settlement agreement by which Berman rescinded the recognition of MEBA and agreed not to recognize any union unless certified by the Board; a simultaneous representation petition filed by Berman; and a lengthy representation proceeding during which Berman maintained that its NLRB settlement precluded it from dealing with any union. In December 1976, the Regional Director ordered an election which was held in January 1977. MEBA won and has thereafter been representing Berman's employees (A 625-630, 1484, 1531-1536, 1567-1568). Since the NLRB certification of MEBA in January 1977—the very day this action was commenced—the Association-Local 333 agreement, including the "subsidiaries and affiliates" clause, could not be applied to Berman as a matter of law. There is no evidence that anyone sought to do so.

Thus, at no time since the effective date of the new Association-Local 333 agreement, April 1, 1976, has that contract been applied to Berman, been observed by Berman, or governed the terms and conditions of employment of Berman's employees. Understandably, Mrs. Frank testified that this clause never affected Berman (A 573-575).

The "Vegetable Oil" Clause.

For many years Local 333 has had separate bargaining relationships with a company called Manhattan Oil Transport Co. ("MOTC"), which operated barges carrying vegetable oil, not petroleum products, and one tug, the Michael Tracy, which was covered by MOTC's Local 333 agreement and supplied about 95% of its towing needs (A 217-220). Unlike the great bulk of towing and transportation employees in New York Harbor, MOTC's bargemen were represented by a labor organization other than Local 333 (A 175). That organization, while insisting that two bargemen be aboard during transfer of cargo, permitted the barges to travel unmanned, a condition which Local 333 considered hazardous to its tugmen (A 182-183). Securing unmanned barges to tugs required tug deckhands to jump from tug to barge and back again, across open water, from one slippery level to another, often in the dark. When barges are manned, lines are tossed or handed from the employee stationed aboard one vessel to the employee aboard the other (A 308-311, 340-341, 198-200).

Local 333 has one other company under contract which operates vegetable oil barges; that company keeps two men aboard its barges at all times, and the Union feared that it would seek the same reduced manning as MOTC (A 175-177, 302-304, 306). Accordingly, for safety reasons and manning scale preservation, the Union sought, unsuccessfully as it turned out, to insure that tugs crewed by Local

333 members were not required to tow unmanned MOTC barges.

As a result of a Union bargaining demand, the 1976 Association-Local 333 agreement included a new provision that no tug covered by the agreement would tow any vegetable oil barge of specified capacity without two bargemen aboard (A 1212). That clause had no effect, was never applied to Berman, and was soon deleted from the contract.

In early April, 1976 having concluded the Association agreement, the Union began negotiations with MOTC, pressing the same demand for the tug Michael Tracy. MOTC resisted, tied up the Michael Tracy, locked out its Local 333 tug crew, successfully operated its barges with the aid of Berman tugs, and forced the Union to accept an agreement which did not require two men aboard vegetable oil barges towed by the Local 333 tug Michael Tracy.

Meanwhile the NLRB Regional Director was considering an unfair labor practice charge filed by plaintiffs under § 8(e) of the NLRA against the "vegetable oil" clause in the Association-Local 333 contract. Rather than litigate the issue—particularly in light of its failure to obtain a similar provision covering the tug performing 95% of MOTC towing—the Union agreed to delete the clause in the Association's collective agreement. On June 15, 1976, the Union wrote the Association confirming the parties' understanding that this clause would no longer be implemented or enforced against anyone (A 1496). Since then, the clause has in fact been a dead letter; and Berman has never contended otherwise. Mrs. Frank testified that the "vegetable oil" clause, like the "subsidiaries and affiliates" clause, did not affect or injure plaintiffs (A 570-575).

"Two Men on a Barge".

The principal economic activity of the towing industry is the transportation of petroleum products; and the "two men on a barge" issue relates to the towing of oil barges. The considerations underlying the Union's position were similar to those prompting the vegetable oil controversy, but even more compelling.

Petroleum products, unlike vegetable oils, are highly combustible, with the ever-present hazard of fire or explosion (A 221). Moreover, although vegetable oil transfers generally take place only during normal business hours (A 221-222), petroleum barges operate around the clock, seven days a week. They may make a number of trips during each 24-hour day, with loading or discharge of oil being accomplished several times during this span. When a barge is being loaded or discharged, a bargeman must be on duty, under Coast Guard regulations as well as basic safety requirements (A 473-474, 597, 838-839).

The Association-Local 333 collective bargaining agreement covering oil barges has long provided that they shall have a four-man crew, two of whom shall be on duty at all times, while the other two are at home on earned vacation time (A 1349). The two bargemen spell each other during the round-the-clock operation, so that each is adequately rested (A. 473-474). Furthermore, during heavy seas, it is often necessary to have two bargemen on duty to insure the safety of the tow and of the tugboat crew. For at such times, to prevent vessel damage, the barge, that is, it is towed at the end of a long rope or hawser. that is, it is towed at the end of a long rope on hawser. If a barge has but a single employee, the change in towing configuration requires a tugboat employee to jump from tug to barge, and back again, while both boats are in transit, across rough seas, with slippery decks at both ends

of the leap. With two men aboard the barge, this is unnecessary (A 555, 829-832, 834, 840-844, 846-849).

Contrary to the universal practice aboard the Association member barges, Berman sought to operate its barges with only one aboard, or with no one aboard. Berman barges had one employee assigned to them, usually for a full week, around the clock; and he generally remained aboard at all times during his assignment (A 555, 836-840, 902-907). This often resulted in round-the-clock assignments with virtually no rest (A 834-840, 919-925, 927-930), imperiling not only the bargeman's own safety but that of the tug crew dependent upon his alertness.

This practice of Berman's also posed a serious threat to the Union's contract standards. With only half the crew of an Association barge, Berman's barge labor costs were substantially lower; and on the basis of labor costs, Berman could take work away from Local 333 contract barges. Moreover, Association members, faced with the choice of using their own barges or Berman's, would have a strong economic incentive to contract out the work to Berman. Thus Berman's lower labor costs—or those of any other company seeking to operate undermanned barges—threatened to diminish the work opportunities and earnings of Local 333 bargemen and generate pressure to lower the manning scale for barges under the Local 333 collective agreement, thus impairing the Union's most basic contract standards. The Association members were fully aware of these cost differentials resulting from undermanning and did in fact hire Berman barges extensively.

The Union and its members took the position that in order to prevent Local 333 employees from being exposed to unnecessary safety hazards and to protect their contract standards and preserve the work opportunities of the bargaining unit, Local 333 contract tugs should not tow under-

manned barges. This position was not confined to Berman nor was it initiated after the April 1, 1976 agreement (A 367-368, 434-435, 1306).

However, the evidence also established that this Union effort was directed at maintaining manning scales within its contract bargaining unit and not at achieving some other objective vis-a-vis Berman. In asking its own contract employers not to tow Berman barges without two men aboard, the Union made no other demands. It did not say that Berman should join the Association, that its vessels should employ Local 333 members, or that Berman should adhere to any other contract terms. And, most significantly, when a second man was placed aboard, the operation proceeded without protest or hindrance (A 505, 519, 524-525).

The Trial Court's Rulings and Instructions

After extensive argument on the motion to dismiss at the end of plaintiffs' case, the trial Court ruled that although the question was close, both claims should be submitted to the jury. On the Sherman Act claim, the Court stated that the "subsidiaries and affiliates" and "vegetable oil" clauses were subject to the labor exemption and, alternatively, were not independently actionable because of "an insufficient showing of anticompetitive purpose or effect" (A 814-815). He stated, however, that the jury could consider these contract clauses as "evidence of intent" (A 816-817).

With respect to the secondary boycott claim, the Court stated only that "there is an issue that should go to the jury as to whether the union sought to compel Berman either to join the Association or to compel its employees to join the union" (A 817-818).

In his charge to the jury, the Court treated the two contract clauses as follows (A 1128):

> "The insertion in the collective bargaining agreement between Local 333 and the Association of the vegetable oil clause, about which you have heard testimony, and the affiliates clause purporting to include Berman in the collective bargaining agreement, the insertion of those clauses in and of themselves is not sufficient to show a violation of the antitrust laws. However, you may consider those clauses and their insertion in the collective bargaining agreement as evidence of an illegal contract, combination or conspiracy as alleged by the plaintiff."

In his charge on the secondary boycott claim, the trial Judge did not specifically mention the contract clauses; nor did he instruct the jury that the "two men on a barge" effort constituted protected activity as a matter of law. The Court charged that *if* the Union's sole purpose was to preserve manning standards on the barges—that is, work preservation for members of the bargaining unit—then the activity was primary and protected. On the other hand, the Court on two occasions emphasized that *if* the Union's purpose—or more specifically, if *an* objective—was to have the Union become representative of Berman employees, *or* to require Berman to join the Association, *or* to coerce the corporate defendants to cease doing business with Berman, then the jury must find for plaintiffs (A 1136-1140, 1585). His Sherman Act charge on the labor exemption was to the same effect (A 1134-1135).

The jury found that there was no agreement, combination or conspiracy to refuse to deal with Berman in violation of the antitrust laws and thus was not required to address the ensuing question as to the applicability of the labor exemption (A 1584). It also found against Berman on the secondary boycott claim.

Reasons for Denying the Writ

The decision of the Court of Appeals is correct, in accord with the decisions of this Court and other Circuit Courts of Appeals, and presents no issue of general importance. Both the District Court and the Second Circuit properly held that the two challenged contract provisions were not illegal under the Sherman Act in and of themselves. The special facts which informed these holdings—particularly plaintiffs' own practice of shuttling crew members and vessels, on an interchangeable, fungible basis, between General Marine and Berman—are unlikely to be replicated. Moreover even if these rulings presented an issue of importance—which they do not—the alternative holding based on the ineffectiveness and deletion of the challenged contract provisions makes this case a particularly inappropriate vehicle for review.

The "two men on a barge" issue also presents no reviewable issue. There was ample evidence that this Union effort was aimed at maintaining union manning and safety standards and preserving work for bargaining unit employees through eliminating competition based on labor costs. Accordingly, that issue was properly submitted to the jury under unchallenged instructions.[3]

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[3] In our view, the admissibility of evidence as to the large increases in the substantial Berman family salaries, following plaintiffs' evidence of corporate fiscal problems and personal sacrifice, so clearly presents a garden variety trial ruling of no general importance that we will not discuss it further and will rely on the record and decisions below and the brief of the association and the defendant corporations.

I

The "Subsidiaries and Affiliates" Clause Was Not Unlawful as a Matter of Law and Had No Anticompetitive Purpose or Effect.

The Courts below properly held that under the facts of this case, with "but a single employer, with interrelated operations, common management and centralized control of labor relations" (12a), the principles of *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* 425 U.S. 800 (1976) and *Radio Union* v. *Broadcast Service of Mobile, Inc.,* 380 U.S. 255 (1965) govern. Berman was not an "unconnected nonparty" *(Ibid)*; and there was ample evidence that the General Marine-Berman tactics frustrated the Union's efforts to enforce the agreement. Accordingly, as the Court of Appeals held, "for purposes of the antitrust exemption, it [this contract provision] was a legitimate union objective to protect employees against shifts of work days (and vessels) designed to avoid the standards and wages established in the collective bargaining agreement." *(Ibid).* See *Artists & Associates, Inc. H.A.* v. *Actors' Equity Association,* —— U.S. ——, 45 USLW 4557 (decided May 26, 1981).

Moreover, even if this be deemed an enlargement of the bargaining unit, which realistically it was not, there was no antitrust violation, for employers and their contracting union, by mutual agreement, may lawfully accomplish that objective. *ILA* v. *NLRB,* 277 F.2d 681 (D.C. Cir. 1960); *Douds* v. *ILA,* 241 F.2d 278 (2d Cir. 1957), *affirming* 147 F. Supp. 103. Here, moreover, General Marine, the Association member, was given the opportunity to withdraw from the Association and from any ensuing agreement after being advised of the likely inclusion of the "subsidiaries and affiliates" clause, and chose, instead, to remain.

The cases cited in the petition are not inconsistent with the decision below. As the Second Circuit correctly noted (12a), *UMW* v. *Pennington*, 381 U.S. 657 (1965) and *Federal Maritime Commission* v. *Pacific Maritime Association*, 435 U.S. 40 (1978) involved labor-management combinations to injure truly separate, unrelated concerns. This is not such a case. The Court of Appeals cases cited at page 18 of the petition involved other provisions of the labor law and totally dissimilar facts; there the bargaining units were separate and distinct, with no substantial interchangeability of employees, no elusive shifting of personnel in and out of the agreement, and no common labor relations control.

Finally, the Courts below correctly held that the "subsidiaries and affiliates" provision did not have the requisite anticompetitive purpose or effect, a ruling that raises no issue worthy of review by this Court. The purpose of the provision was to prevent evasion of the agreement by practices fully established in the record. If enforced, it would not have led to a refusal to deal with Berman, the sole anticompetitive restraint alleged in the complaint. But, under the particular sequence of events shown through official NLRB records and admitted by plaintiffs' President, it was never enforced, had no impact whatever, and soon became legally ineffective. In these circumstances, it could not have served as the basis of antitrust liability, but, at most, an item of evidence to be considered by the jury in determining whether an actionable combination existed. That is precisely how it was treated.

II

The "Vegetable Oil" Clause, an Abortive Effort to Protect Union Standards and Prevent Safety Hazards, Did Not Violate the Sherman Act.

Firmly rooted in labor and antitrust law is the distinction between protecting union standards and restricting dealing to union signatories. The former is valid under both bodies of law, for it represents a legitimate union effort to preserve the negotiated wages, benefits, and working conditions against lower labor labor costs that threaten to undermine those established standards. Union signatory restraints are disapproved, because they rest not on the protection of union standards but on the mere existence of a union contract; and non-signatories may maintain labor standards and labor costs at least as favorable to employees as a union signatory. This distinction underlies the antitrust analysis in *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975) and has been consistently recognized by the NLRB and the Courts. *NLRB* v. *NMU,* 486 F.2d 907, 912 (2d Cir. 1973), *cert. den'd,* 416 U.S. 970; *Painters Distrcit Council* v. *NLRB,* 328 F.2d 534 (D.C. Cir. 1964).

The "vegetable oil" clause, short-lived and ineffective as it was, clearly constituted a "union standards" not a "union signatory" provision. Embodied in a collective bargaining agreement, it governed the conduct of contract employers and the tugs which they operated; and its requirement as to the crewing of barges towed by those unit tugs had direct relationship to maintaining the manning standards of unit vegetable oil barges and preserving safe working conditions. There was no requirement that the barge-owner be under contract to any union or that the bargemen be union members. Accordingly, the Court of

Appeals' conclusion that this clause did not constitute an actionable antitrust boycott but was protected by the labor exemption fully accords with governing law.

The petition errs profoundly in arguing that collective bargaining agreements between a union and employers may not validly restrict dealings between the contracting employers and outside companies. Such restrictions are routinely and validly imposed by union standards provisions, no-subcontracting provisions, and many other forms of legitimate work preservation. *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *NLRB* v. *ILA*, 447 U.S. 490 (1980).

This Court has long held that a union's efforts to eliminate labor cost competition between its contract employers and other concerns do not violate the Sherman Act, even though they may affect business relationships between the two sets of companies. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *Connell Construction Co.* v. *Plumbers Local 100, supra*. *Connell* makes clear that "labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions" even though "standardizing wages ultimately will affect price competition among employers"; otherwise "the goals of federal labor law could never be achieved." 421 U.S. at 622.

Moreover, the Courts below also correctly recognized, as an alternative ground for their decision, that the vegetable oil clause never impacted on Berman or anyone else, was never applied to any vegetable oil operation, and was soon deleted from the agreement. This alternative holding, sufficient to justify the trial court's ruling and charge, presents no reviewable issue.

III

The Trial Judge Properly Submitted to the Jury, Under the Section 303 Count, the Issue Whether the Union's Conduct, Including the Negotiation of the 1976 Contract Provisions, Was Primary or Secondary.

Point II of the petition appears to urge that the Union's conduct in the 1976 negotiations, whether deemed primary or secondary, entitled Berman to a directed verdict because "the distinction between primary and secondary labor activity" is relevant only to Section 8(b)(4)(B) and not to Section 8(b)(4)(A) of the NLRA (Petition p. 20).

This argument, which was not made at trial, is untenable for several reasons, none of which merit review by this Court. First and foremost, the contention that Section 8(b)(4)(A) of the NLRA does not embody the distinction between primary and secondary labor activity was expressly rejected by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Second, as indicated above, Berman was not an independent, unrelated company but part of a single integrated maritime operation, commonly owned, managed and staffed. One corporate half of a common employer cannot invoke Section 8(b)(4) against an effort to apply a collective agreement to its corporate twin. See *Teamsters Local 560 (Curtin Matheson Scientific, Inc.)*, 248 NLRB No. 156 (1980); *Teamsters Local 179 (Alexander Warehouse & Sales Co.)*, 128 NLR 916 (1960). Particularly is this so when General Marine elected to remain in the Association, declining the opportunity to withdraw, with knowledge that the "affiliates" clause would be included in the new agreement.

Moreover, Berman was not subjected to "coercion, threat or restraint" in connection with this clause, so the initial prerequisite of a Section 8(b)(4) violation was lacking,

NLRB v. *Servette, Inc.*, 377 U.S. at 46 (1974); or at least the jury could so find; and a directed judgment, therefore, would have been error on that account. Indeed, inasmuch as plaintiffs' President admitted that the "affiliates" clause caused Berman no damage, that essential element of a Section 303 claim was also lacking. Finally, as shown above, the clause was ineffective in fact, and shortly afterwards, as a matter of law.

IV

The "Two Men on a Barge" Effort Was Directed at Maintenance of Union Standards, the Preservation of Unit Work, and the Prevention of Unsafe Working Conditions, and, Therefore, Did Not Violate Section 8(b)(4)(B) as a Matter of Law.

Berman argues that the "two men on a barge" issue should not have gone to the jury. In light of the extensive evidence as to the labor cost advantages accruing to Berman from its substandard manning, the Association members' appreciation of the lower barge charter fees resulting from this labor cost differential, the extent to which Association members did hire Berman barges, and the Union's willingness to tow Berman barges when manned by two crewmen, the only serious issue was whether Berman, not the Union, had shown enough to merit a jury submission. The authorities cited in Point II above in connection with the "vegetable oil" clause refute any claim that the "two men on a barge" effort constituted a secondary boycott as a matter of law.

NLRB v. *Local 825 Operating Engineers*, 400 U.S. 297 (1971), on which petitioners rely, is wholly inapposite and presents no inconsistency with the decision below. That case did not involve the protection of union standards at

all, but rather classic union signatory pressure. The union struck to force certain employers to sign a contract which would bind unrelated employers and require the employment of union members on the disputed work. In its "two men on a barge" effort, Local 333 did not attempt to have its members assigned aboard Berman barges, and the jury was instructed to find for Berman if it concluded this to be the Union's objective. The notion that Berman was entitled to a directed judgment is based on both an erroneous view of the controlling law and what the Court of Appeals aptly characterized as "a one-sided interpretation of the facts." (15a)

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BERMAN ENTERPRISES INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Petitioners,

—vs.—

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, MCALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPORTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Questions for Review

Re: Petitioners' Point I

A. Was the court of appeals correct in affirming the district court's ruling that the vegetable oil clause and the affiliates clause in the 1976 labor contract between the Association and Local 333 were within the labor exemption to the antitrust laws?

B. Even if the court of appeals was not correct regarding the applicability of the labor exemption, was the court of appeals nevertheless correct in affirming the decision of the district court because there was no proof of an antitrust violation under the rule of reason?

Re: Petitioners' Point IV

C. Was the court of appeals correct in affirming the district court's ruling that it was permissible for defendants to adduce evidence of the salaries of officers of the plaintiff corporations for the purpose of impeaching credibility?

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United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 13

Other Authorities:

Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127 (1976) 21

Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L.J. 233 (1971) ..... 16n.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-279

BERMAN ENTERPRISES INC., STANDARD TANK CLEANING CORP., and GENERAL MARINE TRANSPORT CORP.,

Petitioners,

—VS.—

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, MARINE TOWING AND TRANSPORTATION EMPLOYERS' ASSOCIATION, MCALLISTER BROTHERS, INC., DIESEL VESSEL OPERATORS, INC., SPENTONBUSH TRANSPORT SERVICE, INC., MORANIA OIL TANKER CORPORATION, BOUCHARD TRANSPORTATION COMPANY, INC., MORAN TOWING & TRANSPORTATION COMPANY, INC., POLING TRANSPORTATION CORPORATION, EKLOF MARINE CORPORATION, RED STAR MARINE SERVICES, INC., REINAUER TRANSPORTATION COMPANIES, INC., and TURECAMO COASTAL & HARBOR TOWING CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI*

This brief in opposition to *certiorari* is submitted on behalf of the Marine Towing and Transportation Employers' Association ("the Association") and all of the company defendants. Local 333, the other defendant, is separately represented. Since Points II and III of the petition relate to labor law claims not asserted against the Association or the company defendants, they are not addressed in this brief.

Summary

The petition for *certiorari* should be denied: the specific considerations for the grant of *certiorari* set forth in Rule 19 are not present in this case, nor is there any other important or special reason for this court to review this case. Petitioners' claim (Petition, p. 13) that this case "raises questions of exceptional importance to competition and the appropriate limits of multiemployer bargaining" is incorrect. The court of appeals and the district court both correctly concluded that the two challenged clauses in the contract were within the labor exemption to the antitrust laws (thus raising no antitrust issues) and, even if they were not, "there was no proof of an antitrust violation under the rule of reason." (A. 12a). Since the result in both courts below was bottomed on a failure of proof, there is no compelling reason for this Court to review the correctness of the ruling relating to the applicability of the labor exemption—that ruling was not essential to the result below. The other issue tendered by petitioners, an evidentiary ruling by the district court, hardly requires review by the highest court in the land.

Counterstatement of the Case

Plaintiffs,* three companies engaged in the marine transportation business under common ownership, sued all defendants under the antitrust laws and one defendant—Local 333—under the labor laws. Defendants are of three categories: (a) the Marine Towing and Transportation Employers' Association (the "Association"), a group of companies operating tugs and barges in and outside New York harbor, (b) a number of the member

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* The term "plaintiffs" is used throughout this brief to refer to petitioners.

companies of the Association, and (c) Local 333, the union representing the seamen working on the tugs and barges.

The antitrust claim, which is the only claim asserted against the Association and the member company defendants, charged an agreement and conspiracy among all defendants to prevent plaintiffs from providing marine transportation services in New York harbor, in violation of Sherman Act, Section 1.

At the close of plaintiffs' case, the district court (Judge Robert W. Sweet) dismissed that portion of plaintiffs' antitrust claim based on the 1976 labor contract between the Association and Local 333. The district court held that the inclusion of the two challenged clauses in the contract was protected by the labor exemption to the antitrust laws and, even if it were not, plaintiffs had failed to make any showing that either clause violated the antitrust laws.

The balance of plaintiffs' antitrust claim—i.e., alleged concerted refusal to deal—went to the jury. At the conclusion of a three-week trial, during which all issues were thoroughly aired, the jury rendered a special verdict rejecting plaintiffs' claim. The jury was asked this question and gave this answer:

> "Was there an agreement, combination or conspiracy among two or more of the defendants to refuse to deal with plaintiff Berman Enterprises, Inc. ('Berman') in violation of the antitrust laws?
>
> Yes ____
>
> No __X__."

All post-trial motions by plaintiffs were denied by the district court.

The court of appeals (Oakes, Meskill, Werker) unanimously affirmed. Rehearing was sought and denied.

Counterstatement of the Facts

The parties

The three plaintiffs are all companies engaged in the marine transportation business in New York harbor (526a-28a).* All three companies are owned and operated by Evelyn Berman Frank, her brothers and children (522a-54a). In the harbor, the companies are known as "the Berman companies" or simply as "Berman" (612a-13a, 337a-38a, 1257a).

The Marine Towing and Transportation Employers Association (the "Association") is an organization whose main function is to represent the tugboat and barge companies in New York harbor in the triennial contract negotiations with Local 333, the union which represents the men on the tugboats and barges (tr. 109, 27a; see also: 1459a).

The member company defendants—McAllister, Morania, Bouchard, Moran, Eklof, Red Star (and its affiliates Diesel Vessel and Spentonbush), Reinauer and Turecamo—are all engaged in the business of marine transportation services, i.e. they operate tugboats and barges, in and/or outside New York harbor (396a, 412a-13a, 436a-37a, 453a, 507a). The member company defendants are merely ten of over 30 members of the Association (345a-46a). General Marine, one of the plaintiffs, is also a member of the Association (565a, 567a-68a, 588a, 1466a, 1468a-69a).

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* Citations in this brief are to the record in the court of appeals, except those preceded by capital "A", which are to the Appendix in this court.

Local 333, as indicated above, is the union which represents the seamen on the tugboats and barges (16a, 37a, tr. 371-72, 543a). The head of the union at the time of the events of this case was Captain Joseph O'Hare (tr. 421).

The confusion over plaintiffs' identity

Mrs. Frank, by her own admission, used the men and crews on the vessels of her different companies "fungibly and interchangeably" (554a), and also used her tugboats interchangeably between Berman and General Marine (556a-57a). The three plaintiff companies also interchanged funds on a daily basis (669a).

At the time Mrs. Frank created Berman in 1971, she did not tell Local 333 that she had done so (604a, 337a), but rather left the union in the dark about which of her vessels were covered by the labor agreement (337a-339a, 290a-91a; cf. 1564a-65a). Local 333 was not aware of the different corporations comprising the Berman companies (337a-38a, 1257a; Exhs. 26 and D-36). Mrs. Frank filed union pension reports for several employees of Berman who worked a substantial portion of their time on vessels which she claimed were not covered by the labor agreement (611a-12a, 606a, 291a, 1498a-1525a). This further confused the union as to which vessels and which employees were operating under the labor agreement (337a-38a, 290a-91a, 1257a).

The MOTC controversy in 1974 and 1975

In 1975 and 1975, Local 333 was engaged in a labor controversy with Manhattan Oil Transport Corporation ("MOTC"). The nub of the controversy was whether Local 333-manned tugboats should tow MOTC barges with less than two men aboard (180a, tr. 163-65, 1281a).

In spite of the controversy between MOTC and Local 333 over manning, Berman continued to tow MOTC barges with less than two men aboard (208a; see also: 228a).

The MOTC dispute resulted in strikes and litigation between Local 333 and MOTC, in which Berman was sometimes joined as a party or was otherwise involved (223a).*

The 1975 pension dispute

In mid-1975, General Marine fell into approximately $50,000 in arrears in its union pension fund payments (569a, 632a). As a result thereof, Local 333 sought to terminate its contract with General Marine (1294a, 632a, 1492a). Litigation ensued between Local 333 and the plaintiffs in this action (1294a-95a, 1492a, 632a-33a). The pension dispute also led to a strike by Local 333 at plaintiffs' place of business, but this strike was enjoined by a judge of the United States District Court two days later (1294a-95a, 821a, 1492a).

The 1976 collective bargaining

The 1973 agreement between the Association and Local 333 expired March 31, 1976 (Exhs. 8 and 50, 1246a, 1451a). Following extensive, hard bargaining that commenced early in the year, the new collective bargaining agreement was signed for the period April 1, 1976

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* Berman benefited handsomely from the MOTC dispute. Berman received the overwhelming preponderance of MOTC's outside towing business in consideration of its backing MOTC in its dispute with Local 333 (225a, 227a-28a).

through March 31, 1979 (1246a, 1197a, 1309a). Plaintiffs' petition involves two clauses in the 1976 labor agreement.

In anticipation of the 1976 negotiations, the Association had called a meeting early in January 1976 to select a Bargaining Committee to negotiate with Local 333 (1451a). Notice of that meeting was sent to and received by plaintiffs (588a).

Mrs. Frank signed and delivered to the Association a Confirmation of Bargaining Authority, authorizing the Bargaining Committee "to negotiate and conclude with the union renewals of present collective bargaining agreements upon such terms and for such period of time as the Association Bargaining Committee deems to be in the best interests of the membership" (1468a-69a, 565a-67a, 568a).

At the meeting of the Association in January 1976 a Bargaining Committee was duly elected (1195a, 346a-47a). The Bargaining Committee was elected by nomination from the floor and election was open to all members of the Association (348a). The Bargaining Committee consisted of representatives from 20 of the 36 members of the Association (343a).

At the outset of the negotiations, Local 333 presented to the Association a series of 10 demands which they sought to have incorporated into the new labor agreement (1280a). The union's demands were the subject of extensive, good-faith bargaining by the Bargaining Committee and Local 333 during the first quarter of 1976 (1470a-75a, 1464a-65a).

The vegetable oil clause

Among the demands which Local 333 made was the demand for a provision known as the "vegetable oil clause," which provided that vegetable oil barges would not be towed unless at least two men were aboard the barges (1257a).

Local 333 explained to the Association that it wanted this clause for the safety of its members, since it was dangerous for the men to have to climb aboard the barges from the tugs while the vessels were at sea (256a-57a, 308a-11a, 340a-41a, 934a-35a). In demanding the vegetable oil clause, Local 333 was also interested in job preservation for its members who worked on barges (303a-05a).

As a result of good-faith collective bargaining between the Association and Local 333, the vegetable oil clause was included in the 1976 agreement (1254a, 1212a). This clause, however, was never honored by the plaintiffs (571a, 574a) nor did Local 333 ever attempt to enforce this clause against plaintiffs (334a-35a). Accordingly, plaintiffs did not suffer and could not possibly have suffered any damage as a result of the inclusion of this clause in the 1976 labor agreement.

The affiliates clause

Another clause demanded by Local 333 in the 1976 negotiations was "the affiliates clause," or, more formally, the "Application of Agreement." This provided that affiliated companies and subsidiaries of signatories of the contract would also be bound by the contract (1280a). Local 333 demanded this clause (a) to eliminate the dispute and confusion which plaintiffs had engen-

dered over which of their vessels would adhere to the agreement, (b) to standardize wages, hours and working conditions for all of its members, and (c) to protect the jobs of members of Local 333 (257a, 290a-91a, 328a-29a, 1473a).

Before agreeing to the affiliates clause, which Mrs. Frank opposed, the Bargaining Committee advised Mrs. Frank that it felt it had to agree to the inclusion of the clause because Local 333 was threatening to strike if the clause was not included in the agreement (272a-75a, 279a-83a, 285a-86a). The vast majority of the companies in the Association did not feel that they could or should be asked to take a strike over this issue (287a, 282a, 275a). The Bargaining Committee gave Mrs. Frank an opportunity to withdraw from the Association before the new agreement was signed, to permit her to avoid being party to an agreement which contained that clause, but she declined to do so (272a-75a, 279a-83a, 285a-86a). In effect, Mrs. Frank sought to force all other companies in the Association to take a strike over a clause which she, virtually alone, wanted to avoid.

As with the vegetable oil clause, plaintiffs never accepted or honored the affiliates clause (574a). Berman did not regard the 1976 labor agreement as binding upon itself or its sibling companies, and did not honor the terms of the 1976 labor agreement (574a).* Accordingly, plaintiffs did not suffer and could not possibly have suffered any damage as a result of the inclusion of this clause in the 1976 labor agreement.

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* In 1976 a labor election was held with respect to the employees of Berman resulting in the selection of a different union, MEBA (1480a-83a). Local 333 has accepted the results of that election and has (1531a-34a), since that time, made no effort to organize Berman or to enforce its contract against Berman.

The labor dispute between plaintiffs and Local 333

In 1975 and 1976, plaintiffs were engaged in a continuing labor dispute with Local 333 (562a, 620a, 304a, 517a, 1556a-57a). The labor dispute involved the manning of vessels by plaintiffs, their failure to pay overtime to members of Local 333, their failure to pay the union's wage scale, their continued attempts to mislead Local 333 as to which of their vessels were honoring the labor agreement and their delinquency to the union pension fund (256a-58a, 262a-63a, 303a-04a, 328a-29a, 336a-37a, 587a, 592a-98a, 1257a, 1497a, Exhs. 26 and D-36).

The labor dispute erupted into extensive litigation with charges and countercharges between Local 333 and plaintiffs (620a, 1556a-57a, 1480a-84a). As Mrs. Frank testified (620a):

> ". . . there were so many charges filed back and forth, I don't know which was which."

The labor dispute spilled over into the dealings between plaintiffs and the member company defendants because, on several occasions, Local 333 men working on vessels sent out by the member company defendants to work with Berman vessels declined to tow or work with unmanned or undermanned barges and tugs (247a, 372a-73a, 398a-400a, 433a, 503a-04a, 516a, 520a-22a, 859a-60a).

Absence of concerted refusal to deal

The member company defendants did not cease dealing with plaintiffs, and have continued dealing with plaintiffs to this day (1457a-58a, 501a-02a, 505a, 400a, 383a, 582a-83a; see also: 576a, 896a-98a). In the few instances in

which vessels of the member company defendants declined to work for or with Berman, that was because the seamen on the vessels, in their capacity as union members, declined to do so (247a, 372a-73a, 398a-400a, 433a, 503a-04a, 516a, 520a-22a). As Fred Baum, Vice President of Morania, testified (512a-22a):

> "Q. The point was not that the company, Morania, was saying that they would not tow without two men on a barge but rather that the union men on the tugs who worked for you said that they refused to tow a barge that did not have two men on it, is that correct?
>
> A. That's exactly right."

In addition, a number of the member company defendants were dissatisfied with the conditions of plaintiffs' vessels and crews: the vessels operated by Berman ranged in age from 29 years to 55 years old (558a, 560a), and several were in a state of disrepair (tr. 790). Berman vessels and crews were considered inadequate to do much of the work of the member companies (418a-19a, 447a, 385a-89a, 471a-73a, 482a, 484a-88a). In truth, Berman was relegated to doing "slough-off" work (613a-14a) and was not operating in direct competition with the member company defendants (cf. 398a, 495a, 508a-09a).

The record is devoid of evidence that the Association or the member company defendants desired or intended to injure Berman or the other plaintiffs. Indeed, the evidence from plaintiffs' own witnesses is directly to the contrary (216a, 212a, 210a, 245a, 247a, 359a, 280a, 521a). Edwin Elzer, President of MOTC, called by the plaintiffs as a witness, testified as follows (216a):

"Q. Now, Mr. Elzer, do you know of any act or any statement by the Association or any member company of the Association indicating a design or a desire to hurt or injure Berman in any way, sir?

A. There was nothing ever conveyed to me that anybody was out to hurt Evelyn. Period.

Q. I take it that the answer to the question is no, is that correct, sir?

A. No; positively."

And Berman's own seaman, James Pease, testified as follows (245a, 247a):

"Q. To your knowledge, did the companies ever refuse to deal with Berman?

A. Not to my knowledge.

* * *

Q. . . . Do you know of any wrong conduct by any company towards Berman during this five-year period of time.

A. Not that I can say, no."

Not a single witness testified to any facts supporting a concerted refusal to deal.

Insofar as there was any decline in business done with plaintiffs by the member company defendants, it was due to factors extraneous to any "conspiracy." Morania, one of the biggest customers of Berman, lost its underlying contract with Con Edison and went out of the sand and gravel business in 1975 (879a-83a)—this accounted for and fully explains the decline in its business with Berman after 1974 (882a-83a). Similarly, McAllister was losing

important customers, including New England Petroleum (469a-71a), thereby virtually eliminating its need for outside towing assistance. Indeed, there was a general decline in business in New York harbor in the mid-1970's (881a, 883a, 214a, 1470a), and most companies tended increasingly to do their own work, rather than refer business out to fringe outfits like Berman.

In sum, as the jury found, there was no conspiracy between or among the defendants to restrain plaintiffs from competing in the marine transportation industry in New York harbor. Similarly, as the district court and the court of appeals held, the two challenged clauses in the 1976 labor agreement provide no basis for an award of antitrust damages against defendants.

Reponse to Point I—

The vegetable oil and affiliates clauses fall within the labor exemption to the antitrust laws and, even if they do not, there was no proof of an antitrust violation.

A.

Petitioners argue that the vegetable oil clause and the affiliates clause in the 1976 contract between the Association and Local 333 violated Sherman Act, Section 1 (Petition, pp. 16-20).

Petitioners place principal reliance on *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) and *Federal Maritime Commission* v. *Pacific Maritime Association*, 435 U.S. 40 (1978).

As the court of appeals correctly held (A. 12a) those cases are not applicable here because they involved em-

ployer bargaining groups and unions conspiring to injure truly separate concerns. In this case, as the jury found, there was no conspiracy to injure Berman and, as the court of appeals held, Berman was not a truly separate concern.

> "Berman's underlying factual premise that it was an unconnected nonparty is simply not true." (A. 12a).

South Prairie Construction Co. v. *Local 627, Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*) (Petition, pp. 18-19), cited by petitioners, concerned the issue of whether the NLRB or a court should, in the first instance, decide the appropriate bargaining unit for purposes of Section 9 of the NLRA. The availability of the labor exemption to the antitrust laws is nowhere raised or considered in that case. Thus, the decision of the court of appeals, contrary to petitioners' contention, does not conflict with the holding of this court in *South Prairie Construction Co.* To the contrary, as the court of appeals recognized, *South Prairie Construction Co.* supports respondents; it expressly adopts the teaching of *Radio Union* v. *Broadcast Service,* 380 U.S. 255, 256 (1965) to wit: where several nominally separate business entities actually comprise an integrated enterprise, they will be treated as a single employer. 425 U.S. at 802 n.3.

In sum, the labor exemption was available here because, as the court of appeals held, the subjects of the challenged clauses dealt with working conditions and job preservation (A. 9a) and because their principal effect was on union members (A. 12a).

B.

Even if the clauses are not within the labor exemption, plaintiffs failed to prove that the claims violated the antitrust laws as measured by the rule of reason. Neither of the clauses constituted an unreasonable restraint of trade, and that is the *sine qua non* for establishing liability under the antitrust laws. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-88 (1978); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977)

As this court stated in *National Society of Professional Engineers*, 435 U.S. at 687-88:

> "The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.
>
> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose . . . Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of challenged

> restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."

Only a handful of practices, those which are "manifestly anticompetitive" on their face (e.g., price-fixing) are deemed to be *per se* violations of the antitrust laws. To be *per se* violations, the practices must have such a "pernicious effect on competition and lack of any redeeming virtue [to be] conclusively presumed to be unreasonable." *Continental TV,* 433 U.S. at 50; *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

This court explained its reluctance to deem the vast bulk of commercial agreements and practices illegal *per se* in *Continental TV,* 433 U.S. at 50 n.16:

> "*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences."

The clauses at bar do not even satisfy the threshold requirements for application of a *per se* standard and must be tested under the rule of reason.* As shown below, in greater detail, they were eminently reasonable

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* Some courts have held and some commentators have suggested that antitrust cases which arise in the context of labor union activity must be tested under the rule of reason, rather than *per se* antitrust rules, even if they involve traditionally *per se* wrongs. See, e.g., *Mackey* v. *NFL,* 543 F.2d 606, 618 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); Handler, *Labor and Antitrust: A Bit of History,* 40 Antitrust L.J. 233, 239-40 (1971). Cf. *Commerce Tankers Corp.* v. *National Maritime Union of America,* 553 F.2d 793, 802 (2d Cir. 1977), noting but not passing upon those authorities on this point.

and had substantial procompetitive effects. First, they assured that, insofar as labor conditions were concerned, the companies would stand on equal footing. Second, they prevented companies like plaintiff General Marine from circumventing the contract (a) by misleading the union as to which boats and personnel were subject to the union rules and (b) by covertly shifting those boats and men around to evade the contract (603a-04a, 337a).

This court in *National Society of Professional Engineers* made clear that the inquiry under the rule of reason is directed at the effect upon competition and commerce, not the fact that the particular plaintiff may have been harmed by the conduct at issue. A substantial and unreasonable restraint of competition must be shown for a recovery under Section 1:

> "The test . . . is whether the challenged contracts or acts 'were unreasonably restrictive of competitive conditions.' . . . [T]he inquiry is confined to a consideration of impact on competitive conditions."

435 U.S. at 690. See also: *Borger* v. *Yamaha Internatl. Corp.*, 625 F.2d 390, 396 (2d Cir. 1980); *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564, 570-72 (5th Cir. 1972).

Thus, in *Kestenbaum*, 575 F.2d at 571, the Court of Appeals for the Fifth Circuit affirmed a jury verdict for a defendant accused of restraining one of its distributors, stating:

> "Under the rule of reason, the test [is] whether 'the effect upon competition in the marketplace was substantially adverse' [citation omitted].

> So interpreted, the rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification [citations omitted] . . .
>
> The emphasis, however, under the rule of reason is on market impact. Dealings between a manufacturer and its agents may be arbitrary, unfair, or lacking in good business judgment, but without more, they will not violate the Act. [citations omitted]. The Sherman Act is not a 'panacea for all business affronts which seem to fit nowhere else' [citation omitted]."

The factors to be considered in applying the rule of reason test were described in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918), and recently reaffirmed in *Continental TV,* 433 U.S. at 49 n.15:

> "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Here, there is no evidence of an anticompetitive purpose or effect, much less both.*

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* See *Borger,* 625 F.2d at 397 n.4.

On the subject of anticompetitive purpose, plaintiffs contend that Captain O'Hare allegedly *admitted* that the inclusion of the clauses was anticompetitive. Captain O'Hare did nothing of the kind, and no record cite is provided by plaintiffs to support this contention. Instead, plaintiffs refer this court not to any testimony, but rather only to a somewhat ambiguous column in Local 333's newspaper over the by-line of Captain O'Hare (1307a) which Captain O'Hare did not write and did not adopt (tr. 424, 431).

The true purposes of the two clauses at issue were testified to at length, as noted above. The purposes were job preservation, safety and standardization of working conditions, none of which is anticompetitive in purpose (256a-57a, 290a-91a, 308a-09a, 328a-29a, 340a-41a, 936a, 1473a).

On the subject of anticompetitive effect, plaintiffs contend that (a) the vegetable oil clause allegedly resulted in a refusal by the defendant towing companies to tow Berman and MOTC barges unless they had two men aboard, and (b) the affiliates clause allegedly eliminated Berman as a supplier of marine transportation services to the defendant companies.

The evidence, however, was directly to the contrary. Mrs. Frank testified that neither clause was applied to or enforced against Berman (574a). Some companies, by Mrs. Frank's own admission, continued to tow her barges with less than two men (547a; see also: 578a); and all of the companies continued to give plaintiffs substantial business throughout the period at issue (1457a-58a, 501a-02a, 505a, 400a, 383a, 582a-83a; Exh. D-23A; see also

576a, 896a-98a).* Similarly, on the few isolated incidents when tugs would not tow unmanned barges, the undisputed evidence was that these were decisions and actions of the union men on the tugs, not the companies (247a, 372a-73a, 399a-400a, 433a, 503a-04a, 516a, 520a-22a).

C.

Even if, contrary to the foregoing, the two clauses were not covered by the labor exemption and did violate the antitrust laws, plaintiffs cannot prevail because they failed to prove that they suffered compensable antitrust damages.

To establish liability under the antitrust laws, plaintiffs must establish, *inter alia,* the "fact of damage" by reason of an antitrust wrong of the defendants. This requires proof that (1) they actually suffered monetary injury because of defendants' wrongful conduct; and (2) that injury is an "antitrust injury", i.e., injury to the plaintiff's competitive position in the business in which the plaintiff is engaged. *GAF Corp.* v. *Circle Floor Co.,* 463 F.2d 752, 758 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973); *Uniroyal, Inc.* v. *Jetco Auto Service, Inc.,* 461 F.Supp. 350, 355-56 (S.D.N.Y. 1978); *Murphy Tugboat Co.* v. *Crowley,* 454 F.Supp. 847, 850-52 (N.D.Cal. 1978); *Jacobi* v. *Bache & Co., Inc.,* 377 F.Supp. 86, 93 (S.D.N.Y. 1974), *aff'd,* 520 F.2d 1231 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976).

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* To the extent that there was any drop-off in the volume of business which any company gave plaintiff, the evidence showed (see pp. 12-13) the decline to be due to business conditions unrelated to this dispute (e.g., the loss by a company of a substantial customer and, thus, less need to get outside towing help) or to a general decline in business in the harbor in this period.

In addition, a party seeking to prove the fact of damage is required to prove more than the fact that it lost money.* The plaintiffs had to prove that they suffered damage of the type that the antitrust laws are intended to prevent: namely, injury which had significant anticompetitive effect. Even if the plaintiffs had shown that they suffered a monetary loss as a result of the defendants' acts, that would not have met their burden of proving the fact of damage. See, e.g., *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *GAF Corp.*, 463 F.2d at 758; *Murphy Tugboat Co.*, 454 F.Supp. at 850-52. See also: *Uniroyal*, 461 F.Supp. at 356; Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127 (1976).

At bar, the evidence on the damage issues showed conclusively Berman's** competitive position was not impaired at all. Its revenues and position in the market continued on the same basis as before the events about which it complains (1457a-59a). Whatever business Berman claimed to have lost was more than made up for by the increase in its business with other companies such as Pittston, River Towing and Bronx Towing (581a, 638a, 680a-84a, 1457a-59a, 1559a-63a; Exh. D-23A). Berman continued to compete for business and to operate in the areas of business it had always operated in.***

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* Actually, plaintiffs did not even prove that they lost money. The evidence showed that their gross revenues remained constant (1457a-59a). Plaintiffs introduced no proof of lost profits, or any other competent proof of damages. Indeed, plaintiffs did not even offer into evidence their financial statements or tax returns for the period in issue.

** Neither General Marine nor Standard Tank, the other two plaintiffs controlled by Mrs. Frank, sought a monetary damage award.

*** At trial, plaintiffs claimed that the defendant companies, and in particular Moran's, had changed their manner of dealing with Berman

In short, the evidence showed that any decline in business which the defendant companies gave to Berman was the result of other business factors—including the loss of business by the defendants themselves and thus a reduction in available business to refer to other companies (879a-83a, 469a-71a), the inefficiency or inadequacy of Berman's vessels (418a-19a, 447a, 385a-89a, 471a-73a, 486a-89a, 613a), other disputes between the parties (586a, 653a-55a), and the general decline experienced in the New York Harbor in the period at issue (881a, 883a, 214a; Exh. D-33, p. 1)—rather than from any antitrust violation.

Response to Point IV—

The salary evidence was admissible to impeach credibility.

Plaintiffs argue that the decision below holds, incorrectly, that "salaries received by Berman's management showed Berman was not injured" (Petition, p. 24). Plaintiffs misconstrue defendants' argument with respect to the admissibility of the salary evidence and ignore the true holding of the court of appeals on this issue.

The evidence was relevant to Berman's operations and was admissible to impeach the credibility of Berman's president, Mrs. Frank. As the court of appeals held, "Here, the salary information was simply one of many pieces of evidence and it was submitted for limited purposes, without either undue emphasis or unscrupulous references." (A. 17a). The issue hardly rises to the level of one requiring consideration by the highest court in the land.

(tr. 775, ll. 11-779, l. 12). The evidence showed conclusively that that had not occurred (889a-90a, 1421a-50a).

Conclusion

The petition for *certiorari* should be denied.

Respectfully submitted,

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